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Authoritarian Constitutionalism

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AUTHORITARIAN CONSTITUTIONALISM

Mark Tushnet†

Using Singapore as an extended case study, this Article examines the idea of authoritarian constitutionalism, which it identifies as a system of government that combines reasonably free and fair elections with a moderate degree of repressive control of expression and limits on personal freedom. After describing other versions of non-liberal constitutionalism, including “mere” rule-of-law constitutionalism, the Article offers an extended analysis and critique of accounts of constitutionalism and courts in authoritarian countries. Such accounts are largely strategic and instrumental, and, I argue, cannot fully explain the role of constitutions even in those countries. Rather, I argue, where constitutionalism exists in authoritarian systems, it does so because the rules have a modest normative commitment to constitutionalism. The Article concludes by describing the characteristics of authoritarian constitutionalism and offering a modest defense of its normative appeal in nations with specific social and political problems, such as a high degree of persistent ethnic conflict.

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INTRODUCTION

Within days of the Singapore parliamentary election in May 2011, Lee Kuan Yew and Goh Chok Tong announced that they had decided to leave the nation's cabinet, where they had been serving as "Minister Mentor" and "Senior Minister," positions created for them as former prime ministers.¹ The reason was that the People's Action Party (PAP), which Lee Kuan Yew had founded with others in the 1950s and which had governed the nation since its separation from Malaysia in 1965,² had suffered a huge electoral defeat, while other members of the PAP said that the party would have to "change the way it governs" and engage in some "soul-searching."³

The defeat? The PAP won just over 60% of the votes and 81 out of the 87 seats in Parliament filled by election.⁴ Anywhere else achieving those results in a reasonably free and fair election, as Singapore's was,⁵ would be described as a landslide, not a defeat. The PAP's domination of Singapore politics and policymaking for nearly a half-century, through reasonably free and fair elections in a society without gross examples of violent repression of opposition, may be unique. In this Article, I use Singapore's experience to explore the possibility that it exemplifies an as-yet underexamined form of constitutionalism, which I label "authoritarian constitutionalism."⁶

¹ See Shamim Adam, *Lee Kuan Yew Ends Five-Decade Role in Singapore Cabinet After Poll Setback*, BLOOMBERG (May 15, 2011), <http://www.bloomberg.com/news/2011-05-15/singapore-ruling-party-seeks-to-renew-image-with-lee-kuan-yew-resignation.html>; *infra* note 334 (discussing the creation of the post of "Minister Mentor"). Goh Chok Tong was the nation's second Prime Minister. Adam, *supra*.

² The PAP had been the dominant party in Singapore since it became fully self-governing in 1959. In 1963 Singapore joined with other Southeast Asian entities to form the Federation of Malaysia, which expelled Singapore from the federation in 1965. See Adam, *supra* note 1.

³ Adam, *supra* note 1.

⁴ For discussion of the ways in which additional seats are filled by appointment, see *infra* text accompanying notes 112–14.

⁵ Obviously, any electoral system that translates 60% of the vote into 93% of the seats is highly gerrymandered. For a discussion of Singapore's electoral arrangements, see *infra* Part I.D.

⁶ Examples of authoritarianism are ready at hand, but examples of authoritarian constitutionalism are harder to come by. Candidates include Malaysia, Mexico before 2000, and Egypt under Mubarak. Somewhat weaker candidates, because their authoritarianism was stronger, are Taiwan between roughly 1955 and the late 1980s and South Korea for most of the period between 1948 and 1987. Consider this description of Mexico, written in 1991: "Mexico has had a pragmatic and moderate authoritarian regime . . . [,] an inclusionary system, given to co-optation and incorporation rather than exclusion or annihilation; an institutional system, not a personalistic instrument; and a civilian leadership, not a military government." Peter H. Smith, *Mexico Since 1946*, in 7 CAMBRIDGE HISTORY OF LATIN AMERICA 83, 93 (Leslie Bethell ed., 1990) (emphasis omitted). The difficulty with using the latter two nations as examples of authoritarian constitutionalism is that the termination of authoritarian rule casts a shadow backwards over our understanding of its operation during its long period of stability. See *infra* text accompanying notes 181–83 (discussing the literature on the role of constitutional courts when elites believe that the

Legal scholars and political theorists interested in constitutionalism as a normative concept tend to dichotomize the subject. There is liberal constitutionalism of the sort familiar in the modern West, with core commitments to human rights and self-governance implemented by means of varying institutional devices, and there is authoritarianism, rejecting human rights entirely and governed by unconstrained power holders.⁷ Charles McIlwain's often-quoted words exemplify the dichotomization: "[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law," and "[a]ll constitutional government is by definition limited government."⁸

This Article explores the possibility, perhaps implicit in a restrained understanding of McIlwain's formulation, of forms of constitutionalism other than liberal constitutionalism.⁹ The Article focuses on what I call authoritarian constitutionalism.¹⁰ That discussion is connected to recent literature in political science on hybrid regimes.¹¹

termination of authoritarian rule is likely to occur relatively soon). Note, though, that the Mexican system lasted for more than a half-century, as has the Singaporean one. That seems to me long enough to place the systems in a category worth studying. The French Fourth Republic lasted just over a dozen years. That Singapore may be *sui generis* is suggested by the fact that Lee Kuan Yew remains the dominant figure in Singapore politics; the regime has not yet had to face a serious question of leadership succession, although the PAP's leaders have been grappling with the issue of second- and third-generation leadership for decades. For a summary of efforts to develop a successor generation of leaders, see MICHAEL D. BARR & ZLATKO SKRBIŠ, *CONSTRUCTING SINGAPORE: ELITISM, ETHNICITY AND THE NATION-BUILDING PROJECT* 66–67 (2008).

⁷ See CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 20–21 (1947).

⁸ *Id.* at 21–22.

⁹ Cf. James D. Fearon & David D. Laitin, *Explaining Interethnic Cooperation*, 90 AM. POL. SCI. REV. 715, 717 (1996) (suggesting that political scientists have more robust accounts of "occasional outbreaks of ethnic violence" than of "the much more common outcome of ethnic tensions that do not lead to sustained intergroup violence"). Similarly, constitutional scholars have well-developed substantive and descriptive theories of liberal constitutionalism and authoritarianism but only sketches of such theories of intermediate cases such as authoritarian constitutionalism.

¹⁰ For other recent uses of the term, see Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and Its Legacy*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 361, 362 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003) (characterizing authoritarian constitutionalism as "accept[ing] structures of governance that contain most of the features of constitutional democracy with the noteworthy exception of (parliamentary) democracy itself"); Turkuler Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, 11 INT'L J. CONST. L. 702, 710 (2013) (defining authoritarian constitutionalism as "tak[ing] the form of meticulous adherence to a constitution whose terms directly and unequivocally subordinate the liberties of citizens to an oppressive conception of public order and security"). As will become clear, my definition is different from these.

¹¹ These have been given various names: electoral authoritarianism, ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION 4 (Andreas Schedler ed., 2006),

Drawing on these literatures, this Article outlines some characteristics of authoritarian constitutionalism understood normatively.¹²

The reason for such an exploration parallels that for the analysis of hybrid regimes. For a period, those regimes were described as transitional, on the assumption that they were an intermediate point on a trajectory from authoritarianism to liberal democracy.¹³ Scholars have come to understand that we are better off seeing these regimes as a distinct type (or as several distinct types), as stable as many democracies. In short, they have pluralized the category of regime types.¹⁴ Similarly, I suggest that pluralizing the category of constitutionalism will enhance understanding by allowing us to draw distinctions between regimes that should be normatively distinguished. Consider one “list of . . . electoral authoritarian regimes (as of early 2006) . . . [:] Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, and Tajikistan; . . . Algeria, Egypt, Tunisia, and Yemen; . . . Burkina Faso, Cameroon, Chad, Ethiopia, Gabon, Gambia, Guinea, Mauritania, Tanzania, Togo, and Zambia; . . . Cambodia, Malaysia, and Singa-

competitive authoritarianism, STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 3 (2010), and semi-authoritarianism, Martha Brill Olcott & Marina Ottaway, *Challenge of Semi-Authoritarianism*, CARNEGIE PAPER NO. 7 (Carnegie Endowment for Int’l Peace), Oct. 1, 1999, available at <http://www.policyarchive.org/handle/10207/bitstreams/6578.pdf>. The literature in political science is more concerned with the conditions for the emergence and stability of hybrid regimes than with normative issues, but some parts of the literature shed light on normative issues, as does the related literature on the functions of constitutions and courts in truly authoritarian regimes. For a discussion of the latter, see *infra* text accompanying notes 162–65. The political science literature developed in part because political scientists found that describing the intermediate regime forms as transitional from authoritarian to liberal democracy seemed empirically inaccurate. For such an observation about Singapore, see FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 86 (2003) (describing Singapore’s regime as “an . . . exception to the rule [of transition to liberal democracy] and one that will not last”).

¹² This Article is an exploration of a conceptual possibility that has some connection to empirical reality, but I do not claim that any existing system fits my concept of “authoritarian constitutionalism” precisely. For similar explorations, see JOHN RAWLS, *THE LAW OF PEOPLES* 64–67 (1999) (discussing the conceptual possibility of a “decent hierarchical society”); Baogang He & Mark E. Warren, *Authoritarian Deliberation: The Deliberative Turn in Chinese Political Development*, 9 *PERSP. ON POL.* 269 (2011) (developing a theory of “authoritarian deliberation” using China as a case study).

¹³ See LEVITSKY & WAY, *supra* note 11, at 3–4 (referring to a “democratizing bias” and the “assumption that hybrid regimes are . . . moving in a democratic direction” in the relevant literature). For a recent discussion at least implicitly in the literature of transition, see Dan Slater, *Strong-State Democratization in Malaysia and Singapore*, 23 *J. DEMOCRACY* 19, 20 (2012) (describing how democratization in Malaysia and Singapore would be considered “strong-state democratization”).

¹⁴ For a description of the need to pluralize specific to Singapore and Malaysia, see Diane K. Mauzy, *The Challenge to Democracy: Singapore’s and Malaysia’s Resilient Hybrid Regimes*, 2 *TAIWAN J. DEMOCRACY* 47, 51–52 (2006).

pore.”¹⁵ Whatever the utility for political scientists of treating these nations as a single group, for a normative constitutionalist there are obvious distinctions to be drawn: from a constitutionalist’s point of view, even as of 2006 Russia was different from Singapore and Malaysia, and China different from Singapore. Describing a category of authoritarian constitutionalism—and, more generally, pluralizing our understanding of constitutionalism—may contribute to analytic clarity in law as it did in political science.¹⁶

I begin here with a brief description of three forms of constitutionalism other than liberal constitutionalism.¹⁷ In absolutist constitutionalism, a single decisionmaker motivated by an interest in the nation’s well-being consults widely and protects civil liberties generally, but in the end, decides on a course of action in the decisionmaker’s sole discretion, unchecked by any other institutions.¹⁸ In mere rule-of-law constitutionalism, the decisionmaker conforms to some general procedural requirements and implements decisions through, among other things, independent courts, but the decisionmaker is not constrained by any substantive rules regarding, for example, civil liberties.¹⁹ Finally, in authoritarian constitutionalism liberal freedoms are protected at an intermediate level, and elections are reasonably free and fair.²⁰

The table below summarizes the preceding discussion and indicates why authoritarian constitutionalism might be distinctive. The Article proceeds by describing in Part I Singapore’s constitutionalism, to motivate the later consideration of a more generalized account of authoritarian constitutionalism. Beginning the effort to pluralize the idea of constitutionalism, Part II examines the role of constitutions

¹⁵ Andreas Schedler, *The Logic of Electoral Authoritarianism*, in ELECTORAL AUTHORITARIANISM, *supra* note 11, at 3; *see also* JENNIFER GANDHI, POLITICAL INSTITUTIONS UNDER DICTATORSHIP 14–15 (2008) (including China and Singapore as dictatorships).

¹⁶ Some hints of pluralization crop up in discussions of “shortfall[s]” from full constitutionalism in basically constitutionalist nations and of the distinction between constitutions that are “shams” and those that, while not fully realized in practice, are “aspirational.” *See, e.g.*, David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 880–81 (2013) (observing that “[i]t can be difficult . . . to distinguish empirically between aspirational constitutions . . . and sham constitutions”).

¹⁷ The descriptions are elaborated in somewhat more detail in the succeeding parts of the Article.

¹⁸ *See* Stephen Holmes, *Constitutions and Constitutionalism*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 200, 200–02 (Michel Rosenfeld & Andras Sajó eds., 2012). One might question whether this form should be given the label “constitutionalism,” on the ground that constitutionalism by definition requires that the government’s decision-making power be limited. I have tried to finesse that question by assuming that the decision maker is motivated by (its view of) the nation’s best interests, but I remain open to being persuaded that “absolutist constitutionalism” is an oxymoron.

¹⁹ *See* Li-Ann Thio, *Constitutionalism in Illiberal Politics*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 18, at 134–36.

²⁰ *See id.* at 146–47.

and courts in absolutist nations and in nations with mere rule-of-law constitutionalism. Part III is deflationary, arguing against some political scientists' instrumental or strategic accounts of constitutions, courts, and elections in nations with fully authoritarian systems, where liberal freedoms are not generally respected. Part III also implicitly suggests that whatever semblance of true constitutionalism there is in such nations results from normative commitments by authoritarian rulers. Part IV lays out some general characteristics of authoritarian constitutionalism, again with the goal of suggesting that authoritarian constitutionalism may best be defined by attributing moderately strong normative commitments to constitutionalism—not strategic calculations—to those controlling these nations. The upshot of Parts II through IV is that either (a) the commitment to constitutionalism in all authoritarian regimes is a sham, or (b) at least some of them—the ones I label “authoritarian constitutionalist”—might have a normative commitment to constitutionalism. I conclude with the suggestion that authoritarian constitutionalism has some normative attractions, at least in nations where the alternative of authoritarianism is more likely than that of liberal democracy.

TABLE 1. VARIETIES OF CONSTITUTIONALISM

		Level of Force and Fraud in Elections (or No Elections)			
		Low	Intermediate	High	No Elections
Liberal Freedoms	Low	Illiberal democracy or mere rule-of-law constitutionalism	Semiauthoritarianism	Authoritarianism	Authoritarianism
	Intermediate	Authoritarian constitutionalism	[Authoritarian constitutionalism?]		Mere rule-of-law constitutionalism
	High	Liberal democracy			Idealized absolutist monarchy

I

CONSTITUTIONALISM (?) IN SINGAPORE

Understanding the nature of Singapore's authoritarian constitutionalism can provide the foundation for understanding authoritarian constitutionalism more generally. In this Part, I offer an overview of some important features of Singapore's legal system and their effects. The topics range from surveillance of private life to electoral manipulation. In each area, I argue, Singapore's legal system is clearly not that of a liberal democracy, but neither is it fully authoritarian. At the least, there are interstices tolerated by the regime in which standard liberal freedoms, including freedom to dissent from existing policy, can be found. Cumulatively, I believe, these features show that Singa-

pore's regime appears to adhere to some version of normative constitutionalism.

A. A Brief Account of Singapore's Constitutional History

Singapore was a British colony from the nineteenth century through the mid-twentieth.²¹ After a brutal occupation by Japanese armed forces during World War II and in conjunction with worldwide trends of decolonization, Singapore gained increasing internal self-government through the 1950s.²² Full self-government arrived in 1963, when, led by Lee Kuan Yew and the PAP, Singapore signed an agreement with Malaya and several former British territories in Borneo to create the Federation of Malaysia.²³ Ethnic tensions strained the federation almost immediately, with Singapore's Chinese population believing that the federation's policies unfairly favored people of Malay origin, and Malays in Singapore outraged at PAP policies.²⁴ These tensions were exacerbated by Indonesian military activity and led to ethnic riots in Singapore.²⁵ Malaysia expelled Singapore from the federation in 1965,²⁶ and Singapore became an independent nation.

With this as background, I now provide a description of some key aspects of the general system of civil liberties and elections in Singapore over the last half-century.

B. Chewing Gum and Caning

Mention Singapore to a reasonably informed audience and some of the first things one hears deal with chewing gum and caning. Chewing gum, it is said, is banned in Singapore, and caning symbolizes the regime's harsh treatment of minor offenses.

As it happens, chewing gum is no longer banned, as a result of the free trade agreement that Singapore has with the United States.²⁷

²¹ This summary draws upon A HISTORY OF SINGAPORE (Ernest C.T. Chew & Edwin Lee eds., 1991), especially Yeo Kim Wah & Albert Lau, *From Colonialism to Independence, 1945–1965*, in *id.* at 117.

²² See *id.* at 124–29.

²³ See *id.* at 157–59.

²⁴ See *id.*

²⁵ See *id.* at 157.

²⁶ Lee Kuan Yew called the expulsion “a moment of anguish,” contradicting his life-long hope for merger with Malaya. EDWIN LEE, SINGAPORE: THE UNEXPECTED NATION 598 (2008).

²⁷ The United States insisted that imports of chewing gum be allowed. See Regulation of Imports and Exports Act, Cap. 272A, Rg. 4, 1999 Rev. Ed. Sing. The compromise position was to make chewing gum available for medicinal uses; I have been unable to determine how readily it is actually available. One local informant conveyed his impression that chewing gum is generally available in pharmacies and supermarkets as long as it contains some ingredients plausibly describable as having medicinal properties.

The caning story is more interesting. Caning attracted attention in the United States when a U.S. citizen was sentenced to be caned for vandalizing several cars as a teenage prank.²⁸ Caning as a punishment for vandalism was instituted in 1966, when political protestors threatened to place “Yankee Go Home” posters on the walls of private businesses as part of their activities against the War in Vietnam.²⁹ The punishment remained available for ordinary acts of vandalism.³⁰

Chewing gum and caning are metaphors that capture a widespread sense that Singapore is a state in which the government intrudes deeply into private life.³¹ Whether Singapore is more of a “surveillance state” than other modern regimes is, I think, open to question. The regime has conducted overt surveillance of public political protests,³² and the Prime Minister once responded to a question about how he knew with some precision what had been said at a private meeting of an opposition group, “In the age of the tape recorder, you want to know how I am able to get a transcript of what you said?” (to which the questioner asked, “But how did the tape recorder get into the . . . room?”).³³ Visitors to Singapore regularly comment on the absence of a visible police presence in the city. “Visible” is the operative word, because there may be large numbers of undercover police agents deployed in the ordinary course. And, perhaps more important, it might be that Singapore’s regulation of life is so perva-

²⁸ See Li-Ann Thio, *Taking Human Rights Seriously? Human Rights Law in Singapore, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA* 158, 163 (Randall Peerenboom et al. eds., 2006) (describing the incident).

²⁹ The background is described in JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 71–72 (2012). According to Rajah, the threat was unsuccessful.

³⁰ It is worth observing that bill posting on private property without the owner’s consent is generally unlawful in the United States and Great Britain, as the ubiquitous sign in London, “Bill Posters Will Be Prosecuted,” indicates. See, e.g., Town and Country Planning Act 1990, c. 8, § 224 (Eng.) (“Enforcement of control as to advertisements”); N.Y.C. Admin. Code § 10-117 (1985) (“No person shall . . . attach or place by whatever means a sticker or decal of any type on any . . . private building or . . . any other real or personal property . . . unless the express permission of the owner or operator of the property has been obtained.”).

³¹ See Li-Ann Thio, *Lex Rex or Rex Lex?: Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1, 36 (2002) (referring to “government attempts to influence behaviour in the most intimate affairs,” including “public campaigns to flush toilets”). I note that such campaigns are primarily government speech, though presumably backed up by the possibility of some sort of sanction in egregious cases.

³² On some occasions the protestors have responded to government videotaping of their activities by videotaping the officers conducting the surveillance. See CHERIAN GEORGE, *CONTENTIOUS JOURNALISM AND THE INTERNET: TOWARDS DEMOCRATIC DISCOURSE IN MALAYSIA AND SINGAPORE* 128 (2006) (describing government cameras at public rallies); cf. *Laird v. Tatum*, 408 U.S. 1, 2 (1972) (holding nonjusticiable a challenge to U.S. government surveillance of public demonstrations).

³³ RAJAH, *supra* note 29, at 205–06.

sive that its residents have fully internalized the norms the regime wishes to advance, which would reduce the need for a visible police presence.

All that said, Singapore seems far from full authoritarianism in the degree to which the regime penetrates ordinary life.

C. Freedom of Expression

1. *A Survey of Singapore's Regulation of Expression*

a. *The Internal Security Act*

Singapore has an Internal Security Act (ISA) that authorizes detention without trial of those thought to pose a threat to national security.³⁴ It has been used in Singapore on three notable occasions.³⁵ Two involved threats that reasonably, though not inevitably, could be regarded as serious enough to justify the invocation of emergency powers.³⁶ The third involved a clear exaggeration by the government of the threat posed by efforts by Roman Catholic social workers inspired by liberation theology to organize Singapore's poor.³⁷ The use of the ISA in response to what government officials called the "Marxist Conspiracy" looms large in the current memory of today's dissidents and those who might join them.³⁸

The ISA is the classic sword of Damocles, which is effective in deterring dissent even when it merely hangs suspended over their heads. And, perhaps unlike similar emergency laws in fully constitutionalist legal orders, the fact that the ISA was invoked abusively in 1987 suggests that the thread holding it in suspense might be cut again. Yet, Singapore's track record of abusive invocations of emer-

³⁴ Internal Security Act, Cap. 143, 1985 Rev. Ed. Sing.

³⁵ The ISA has been invoked sporadically in individual cases, but the three incidents described in the text are those regularly dealt with in discussions of constitutionalism in Singapore.

³⁶ One episode occurred before Singapore became independent, but is generally regarded as part of the relevant history of the Internal Security Act's use. In the run-up to the creation of the Federation of Malaysia, security forces detained leaders of a major opposition group, known as Barisan Sosialis, which opposed the merger and was an ally of communist-led insurgent forces operating in Malaya. See CHRIS LYDGATE, *LEE'S LAW: HOW SINGAPORE CRUSHES DISSENT* 39–40 (2003). The ISA's invocation was authorized by the Internal Security Council, which had on it representatives of Singapore, Great Britain, and the Federation of Malaya. See *id.* at 40 (2003). In 2001 and 2002 the Internal Security Act was used to detain members of Jemaah Islamiyah, a group affiliated with al-Qaeda. See Michael Hor, *Singapore's Anti-Terrorism Laws: Rhetoric and Reality*, in *GLOBAL ANTI-TERRORISM LAW AND POLICY* 277–80 (Victor V. Ramraj et al. eds., 2012).

³⁷ For a description of the events, see Jack Tsen-Ta Lee, *Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore*, 2012 SING. J. LEGAL STUD. 298, 307–08.

³⁸ See Andrew Jacobs, *As Singapore Loosens Its Grip, Residents Lose Fear to Challenge Authority*, N.Y. TIMES, June 18, 2012, at A11 (quoting a Singaporean activist, "It cast such a large shadow that people here still feel constrained about speaking up.").

gency powers may still be comparable to the track record in those other orders: no more than one abuse in twenty-five or more years is not a terrible record among fully constitutionalist regimes.

b. *Sedition Laws*

Singapore inherited a British-style sedition law authorizing criminal punishment for criticizing government policies,³⁹ on the ground that such criticism might foment discontent with those policies and ultimately produce social disorder through lawbreaking.⁴⁰ Singaporean authorities chose to use other methods of pursuing their critics, though, and the sedition laws have been largely unused.⁴¹ Over the past decade a handful of sedition charges have been brought, based on the view that strong expressions of disagreement with various religious views pose the kind of threat of social disorder—here, of violent communal conflict—to which classic sedition laws are directed.⁴² The expression targeted by these prosecutions might well have been denominated hate speech in jurisdictions with bans on such speech.

c. *Libel Law*

Singaporean authorities have not needed to use criminal sedition law against the regime's critics because individual officials have been able to use individual-level libel laws⁴³ to obtain substantial monetary damage awards from those critics.⁴⁴ Damage liability is particularly effective because of its interaction with Singapore's electoral rules,

³⁹ See Sedition Act, Cap. 290, 1985 Rev. Ed. Sing., §§ 3(1)(e), 4 (2013).

⁴⁰ See Tania Ng Tze Lin, *The Rule of Law in Managing God: Multi-Religiosity in Singapore*, 3 ASIAN J. PUB. AFF. 92, 94 (2010) (discussing strict limitations imposed on otherwise broad religious rights under Singapore's constitution when religious activities are contrary to the government's interest).

⁴¹ For a discussion of more frequently used methods of punishing critics, see *infra* Part I.C.1(c).

⁴² See Lin, *supra* note 40, at 97 (describing the first post-independence sedition prosecution in 2005 brought against “three bloggers [who] made inflammatory remarks against the Malay-Muslim community,” and another in 2009 against “a Christian couple . . . for distributing seditious publications that denigrated the Catholic Church and Islam”). For a vigorous criticism of the latter prosecution as unjustified under the Sedition Act's terms, see Yock Lin Tan, *Sedition and Its New Clothes in Singapore*, 2011 SING. J. LEGAL STUD. 212, 227 (outlining reasons for disapproval of the court's reasoning and stating that “[i]t is difficult, with respect, to defend the court's conclusion”). Tan discusses the relationship between the Sedition Act and hate-speech regulations. *Id.* at 235–36.

⁴³ For overviews of Singapore libel law, see Lee, *supra* note 37, at 313–18; Cameron Sim, *The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law*, 20 PAC. RIM L. & POL'Y J. 319, 331–45 (2011).

⁴⁴ See Sim, *supra* note 43, at 320–21.

which make people with undischarged bankruptcies ineligible for public office.⁴⁵

The form of Singapore's libel law is rather traditional and has not been substantially modified to take concerns about free expression into more account than the classic common law did.⁴⁶ With respect to public officials, Singapore's High Court expressly rejected modifications of the sort imposed by *New York Times v. Sullivan*⁴⁷ and its analogues in other common law systems.⁴⁸ The court's reasons were traditional ones, with a modest adaptation to what it thought were Singapore's special circumstances: false statements about public officials undermine public confidence in their conduct and thereby impair the government's effectiveness.⁴⁹ Specifically, according to the court, Singapore's success, both economically and in stabilizing a multicultural society, rests on stringent policies against corruption, known by all to be vigorously enforced.⁵⁰ False imputations of corruption are especially damaging in Singapore because "the best people must be attracted to serve the Singaporean leadership without fear of damage to their reputations."⁵¹ And, Singapore's courts are relatively generous in describing statements about a public official's conduct as imputing corruption to the official as sufficient to warrant a judgment

⁴⁵ CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 45(1)(b). Such a disqualification is not uncommon around the world. It rests on the judgment, sensible in the abstract, that an official laboring subject to a continuing obligation to pay his or her creditors might be tempted to use public office for private gain (personal gain in the first instance, but of course with the gain to be transferred to the creditors). See Thio, *supra* note 31, at 19–20 (reporting a finding "that between 1971–1993, 'there had been 11 cases of opposition politicians who had been made bankrupt after being sued'"); see also LYDGATE, *supra* note 36, at 260 (providing a descriptive compilation of libel suits brought by government officials).

⁴⁶ See Sim, *supra* note 43, at 327–31.

⁴⁷ See 376 U.S. 254, 264 (1963) (holding that the First Amendment protects the publication of any statement, including a false one, about the conduct of public officials unless the speaker makes the statement with actual malice).

⁴⁸ See *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, [1992] 2 SLR 310 (Sing. C.A.). The defendant, known in Singapore as JBJ, was, until his death in 2008, the leading figure in Singapore's opposition. See Seth Mydans, *J.B. Jeyaretnam, 82, Singapore Opposition Figure, Is Dead*, N.Y. TIMES, Oct. 5, 2008, at 43 (describing Jeyaretnam as an "opposition politician whose persistent outspokenness made him a leading dissident in Singapore"). Li-Ann Thio, *Between Apology and Apogee, Autochthony: The 'Rule of Law' Beyond the Rules of Law in Singapore*, SING. J. LEGAL STUD. 269, 290–92 (2012), finds some intimations in relatively recent decisions of the possibility that Singapore's courts will move closer to the position on libel held in other common law jurisdictions, though not as far as *New York Times v. Sullivan*.

⁴⁹ See Thio, *supra* note 48, at 293–94 (describing how libel or slander suffered by public officials affects the reputation of Singapore as a whole).

⁵⁰ For a good summary of this position, see *id.* at 276. For a discussion of why I attempt to present reasonably sympathetic accounts of the reasons offered for this and other aspects of Singaporean law, see *infra* text accompanying notes 52–53.

⁵¹ Sim, *supra* note 43, at 329.

on the merits of both the interpretation and the determination of the statements' falsity or accuracy.

The courts' emphasis on the special harm that false imputations of corruption do in Singapore explains what might be Singaporean libel law's largest deviation from traditional common law rules: it is appropriate that damage awards be larger when the target of the false statement is a high public official, because the damage to reputation and to Singaporean stability is larger.⁵² As one judge put it, "[T]he greater the reputation of the person defamed, the greater the damage award that will be made—on the basis that these persons are more vulnerable in so far as they are well known . . . and have a wider circle of social and business contacts."⁵³

d. *Judicial Independence*

In 1986 a senior trial judge was transferred to the attorney general's office after he ruled in J.B. Jeyaretnam's favor in a politically charged case.⁵⁴ The action was authorized by law but was unusual because of the judge's seniority. Government critics asserted that the transfer was a form of punishment inflicted on a sitting judge and an indication of the judiciary's lack of independence from the government.⁵⁵ Christopher Lingle, an academic, faced a defamation suit for writing that an unnamed country—clearly Singapore—had a "compliant judiciary [that was used] to bankrupt opposition politicians."⁵⁶ A 1990 report by a committee of the New York City Bar Association said that Singapore's judges were "kept on a very short leash."⁵⁷

These incidents and judgments, though not recent, seem to continue to be apt. Singapore's courts regularly uphold government actions that a more independent judiciary might question, and in the

⁵² This thought is akin to the traditional idea that "the greater the truth the greater the libel." *Bustos v. A&E Television Networks*, 646 F.3d 762, 763 (10th Cir. 2011) (quoting LAURENCE H. ELDRIDGE, *THE LAW OF DEFAMATION* § 64 (1978)). The traditional idea, though, referred to the content of the libelous statement, not the statement's target. Still, the analogy might be sufficient to justify the Singaporean rule as a matter of common law reasoning.

⁵³ *Lee Kuan Yew v. Vinocur & Others*, 3 SING. L. REP. 477, 485–86 (1995).

⁵⁴ See Francis T. Seow, *The Judiciary*, in *THE SINGAPORE PUZZLE* 110 (Michael Haas ed., 1999).

⁵⁵ See, e.g., BEATRICE S. FRANK ET AL., ASS'N OF THE BAR OF THE CITY OF NEW YORK, *THE DECLINE IN THE RULE OF LAW IN SINGAPORE AND MALAYSIA* 95–96 (1990) (observing that judges are "routinely shuffled"); FRANCIS T. SEOW, *THE POLITICS OF JUDICIAL INSTITUTIONS IN SINGAPORE* (1997), available at <http://www.singapore-window.org/1028judi.htm>.

⁵⁶ Christopher Lingle, Op-Ed., *Smoke Over Parts of Asia Obscures Some Profound Concerns*, INT'L HERALD TRIBUNE (Oct. 7, 1994), <http://www.singapore-window.org/1028ling.htm>; see also Philip Shenon, *Singapore Judge Orders U.S. Scholar and Paper to Stand Trial*, N.Y. TIMES (Jan. 10, 1995), <http://www.nytimes.com/1995/01/10/world/singapore-judge-orders-us-scholar-and-paper-to-stand-trial.html?pagewanted=print> (discussing contempt proceedings against Lingle).

⁵⁷ FRANK ET AL., *supra* note 55, at 92.

one notable incident of judicial resistance to a government action, the underlying legislation was immediately modified and the courts deprived of jurisdiction.⁵⁸ Of course, judicial deference to the government is common in nations where one political party dominates the system for an extended period, for obvious structural reasons.⁵⁹ Yet, even among such judiciaries, Singapore's judiciary seems more deferential than others, for example, in forgoing opportunities for subconstitutional review or rights-protective interpretations of statutes.⁶⁰

e. *Regulation of Public Space*

Singapore has an extensive system of regulations dealing with uses of public spaces—streets and parks, in the classic formulation—for political purposes. The Public Order Act of 2009 requires that a permit be obtained for a demonstration by even a single person, and other regulations apply to gatherings of more than a handful of people.⁶¹ Permits must be obtained from a relatively large number of authorities.⁶² The very number of permits required for a single demonstration deters under-resourced groups from applying. Even more, the grounds for denial are unclear.

An incident in 1994 set the terms for discussions of the availability of public space for political purposes. Catherine Lim, a popular novelist, made some mildly critical comments about Singapore's government.⁶³ Government officials responded with what Singaporean activists have characterized—and assimilated into their thinking—as an intense attack upon Lim.⁶⁴ The officials mounted a verbal cam-

⁵⁸ See *infra* text accompanying notes 150–53 for a discussion of this episode.

⁵⁹ The party's control of the government coupled with even modest mechanisms for making judges accountable to the government—through appointment mechanisms, for example—means that eventually the judiciary will consist entirely of judges who owe their jobs to the dominant party.

⁶⁰ The Japanese Supreme Court is offered as an example of a court in a dominant-party system that is, for that reason, “conservative” in its treatment of government initiatives. Yet, it has engaged in a nontrivial amount of subconstitutional review and rights-protective statutory interpretation. For a discussion, see Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493, 1494 (2011) (contending that Japanese courts deviate from established statutory interpretations to create socially desirable outcomes).

⁶¹ See Public Order Act, Cap. 257A, 2009 Rev. Ed. Sing., § 2 (2013) (“[A]ssembly” means a gathering or meeting . . . of persons . . . and includes a demonstration by a person alone . . .”).

⁶² See *id.* § 6.

⁶³ For details of the incident, see Terence Lee, *The Politics of Civil Society in Singapore*, 26 ASIAN STUD. REV. 97, 109–10 (2002) (discussing the “Catherine Lim affair”). The tenor of Lim's statement is captured in this quotation: “Increasingly, the promised . . . style of people-orientation is being subsumed under the old style of top-down decisions.” CATHERINE LIM, A WATERSHED ELECTION: SINGAPORE'S GE 2011, at 132 (2011) (reprinting her 1993 essay).

⁶⁴ See FRANCIS T. SEOW, *THE MEDIA ENTHRALLED: SINGAPORE REVISITED* 27–28 (1998) (describing the government's response as “a blistering open letter”). For a discussion on

paign against Lim and criticized her for capitalizing on her celebrity as a novelist to engage in political commentary: “[I]f you are outside the political arena and influence opinion, and if people believe that your policies are right, when we know they are wrong, you are not there to account for the policy.”⁶⁵ The newspaper that had published her column dropped her as a commentator, and she was unable to find another outlet.⁶⁶ As government officials put it, Lim had gone out of bounds.⁶⁷

The term “out of bounds” entered Singaporean regulatory discourse. Importantly, while government officials acknowledged that there *were* “out of bounds markers,” they refused to specify before the event where those markers were, although “race” and “religion” do appear to be out of bounds.⁶⁸ Protestors engaged in their activities at the peril of later being told that they had strayed out of bounds.⁶⁹

These techniques obviously restricted political uses of public spaces. Yet, a striking feature of some accounts of the problem with unspecified out of bounds markers is this: activists recount episodes in which, before the event, they feared that they would be unable to navigate through the regulatory process to obtain permits, and then express surprise that they were in fact able to do so.⁷⁰ Activists also developed methods of evading the regulatory system. For example, at one point the government lifted all restrictions on “indoor public talks” by Singaporeans, and did not restrict efforts by non-Singaporeans to promote and discuss books they had written. Activists responded by convening “book talks,” nominally presentations by

the assimilation of the threat, see Lenore Lyons, *Internalised Boundaries: AWARE's Place in Singapore's Emerging Civil Society*, in *PATHS NOT TAKEN: POLITICAL PLURALISM IN POST-WAR SINGAPORE* 255 (Michael D. Barr & Carl A. Trocki eds., 2009).

⁶⁵ LIM, *supra* note 63, at 109 (quoting Singaporean Prime Minister Goh Chok Tong).

⁶⁶ SEOW, *supra* note 64, at 28. Lim continued to publish novels and political commentary. For a recent work of her commentary, see LIM, *supra* note 63 (discussing the Singapore general election of 2011).

⁶⁷ See SEOW, *supra* note 64, at 27 (describing the prime minister's open letter charging that Lim “strayed beyond the out-of-bounds markers on political debate”).

⁶⁸ See *id.* at 27–28.

⁶⁹ Even the clarity of the boundaries with respect to race and religion might be illusory in a polity where many issues are tightly bound up with the politics of race and religion. Consider, for example, criticism of some resource-allocation decision made on the nominal basis of geography but with an evident racially disparate impact.

⁷⁰ See, e.g., GEORGE, *supra* note 32, at 137 (describing a “Save JBJ” rally held after getting permits from the police, the Building and Construction Authority to hang banners from building, and the Public Health Commission to sell books and stickers, and asserting that the organizers were as “surprised as anyone when their Save JBJ Rally cleared one regulatory hurdle after another and actually materialized”); LYDGATE, *supra* note 36, at 285–87 (describing the process of organizing the “Save JBJ” rally); Alvin Tan, *Theatre and Cultures: Globalizing Strategies*, in *RENAISSANCE SINGAPORE?: ECONOMY, CULTURE, AND POLITICS* 185, 188–90 (Kenneth Paul Tan ed., 2007) (describing how theater companies “overc[ame] censorship limitations”).

Singaporeans about works by foreign authors but also occasions for informal discussion with the authors themselves about their books and views.⁷¹

The government responded to concerns about the severity of its restrictions on the political uses of public space by adopting what it called an experiment in limited deregulation.⁷² It designated a section of a reasonably centrally located public park as a space in which political speeches could be conducted without prior permission, on the model, it said, of London's Hyde Park Corner.⁷³ The experiment succeeded, at least in the sense that, for a while, it elicited political activity at the designated space.⁷⁴ But, probably consistent with general experience with such venues, the excitement wore off, the use of the space became routine, listeners came to be curiosity seekers rather than political dissidents, and the use diminished, with a revival in usage after the 2011 elections.⁷⁵

f. *Press Regulation*

Regulation of the traditional press and media in Singapore takes two forms. Traditional media based outside of Singapore such as the *Asian Wall Street Journal* must obtain permits to circulate within the nation.⁷⁶ Pursuant to a statute authorizing restrictions on distribution of foreign publications that "engag[e] in the domestic politics of Singapore,"⁷⁷ the government threatens to suspend permits or limit circulation when these newspapers publish material that the government

⁷¹ See Lynette J. Chua, *Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore*, 46 LAW & SOC'Y REV. 713, 734 (2012).

⁷² For more details, see Li-Ann Thio, *Singapore: Regulating Political Speech and the Commitment "to Build a Democratic Society,"* 1 INT'L J. CONST. L. 516, 517–18 (2003) (suggesting that the opening of Speakers' Corner was a response to citizens' views).

⁷³ See *id.* at 518. For a critical description of the Speakers' Corner initiative as "gestural politics," see Lee, *supra* note 63, at 110–11.

⁷⁴ Between 2000 and 2003, some 1,000 speakers registered. See Thio, *supra* note 72, at 519.

⁷⁵ According to one report, within three months of Speakers' Corner's opening, "the novelty . . . was fast fading, with few regular speakers and a sparse, uninterested crowd of listeners." Lee, *supra* note 63, at 111. But see Jacobs, *supra* note 38 (describing recent uses of public spaces other than Speakers' Corner). In 2009 thousands gathered in Speakers' Corner to form a "Pink Dot" demonstration in support of Singapore's LGBT community. See Sharanjit Leyl, *Singapore Gays in First Public Rally*, BBC NEWS (May 17, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/8054402.stm>. The Pink Dot demonstration has continued to attract a large crowd to Speakers' Corner each year, culminating in 21,000 participants in 2013. Eveline Danubrata, *Singapore's "Pink Dot" Rally Shows Growing Pressure for Gay Rights*, REUTERS (June 30, 2013), <http://www.reuters.com/article/2013/06/30/us-singapore-gays-idUSBRE95T03M20130630>.

⁷⁶ For overviews of the regulation of international media in Singapore, see GARRY RODAN, TRANSPARENCY AND AUTHORITARIAN RULE IN SOUTHEAST ASIA: SINGAPORE AND MALAYSIA 27–34 (2004); SEOW, *supra* note 64, at 140–74.

⁷⁷ SEOW, *supra* note 64, at 148.

believes casts government policy in a false and disparaging light.⁷⁸ Sometimes the threats allow limited circulation, but without advertising, which of course makes publication unprofitable.⁷⁹ Yet, the most celebrated examples of government threats seem relatively mild. These threats consist of permit suspension unless the newspaper agrees to publish an unedited version of a government response to the statements to which the government takes exception.⁸⁰

The regulation of large, general-circulation newspapers in Singapore occurs through indirect government influence over the newspapers' board of directors. Singapore law requires that these newspapers divide their shares into two classes, ordinary shares and management shares.⁸¹ Management shares are weighted at two hundred times those of ordinary shares and are held by directors whose appointment must be approved by the government.⁸² According to Cherian George, "[v]irtually all daily titles . . . are published by Singapore Press Holdings," whose management and board "has been headed by former senior officials from government" since the 1980s,⁸³ including one chief executive officer who had been the head of the internal security department.⁸⁴ What George describes as "[o]pposition party newsletters" do "continue to circulate."⁸⁵

Garry Rodan summarizes the regulatory system in these terms: "The emphasis . . . is on ensuring that the medium does not facilitate political mobilisation. . . . This mean[s] restricting political engage-

⁷⁸ See *id.* at 147–48.

⁷⁹ See *id.* at 148.

⁸⁰ *Id.* at 148–49 (describing circulation restrictions placed on *Time* magazine—reducing it from 18,000 to 9,000 to 2,000 copies a week—until the magazine agreed to publish an unedited response).

⁸¹ See *id.*

⁸² See *id.*

⁸³ GEORGE, *supra* note 32, at 48–49. I think it is worth noting that in 2013 George was denied tenure in the School of Communication and Information of Nanyang Technological University, a private university in Singapore. Critics of the decision suggested that the denial occurred because of George's controversial role in commentary on Singaporean politics. See Elizabeth Redden, *Singaporean Scholars Raise Concerns About Controversial Tenure Denial*, INSIDE HIGHER ED (May 2, 2013), <http://www.insidehighered.com/quicktakes/2013/05/02/singaporean-scholars-raise-concerns-about-controversial-tenure-denial>.

⁸⁴ See RODAN, *supra* note 76, at 21.

⁸⁵ Cherian George, *History Spiked: Hegemony and the Denial of Media Diversity*, in PATHS NOT TAKEN, *supra* note 64, at 276 (emphasis added). The distribution of books is worth separate mention. According to RODAN, *supra* note 76, at 91, as of 2004 controversial books were rarely to be found on the shelves of bookstores but were available for special order. A local informant states that today: "A number of books on controversial topics can now be purchased quite openly from bookshops. Examples include a recent book by opposition politician Chee Soon Juan and a number of works by some former 'Marxist Conspiracy' ISA detainees who have denied they were involved in any plot to overthrow the Government." See also HOR, *supra* note 36, at 276 (observing that such books are "on the shelves" in Singapore).

ment and competition to within a narrow sphere of party politics. . . .”⁸⁶

g. *Internet Regulation*

Some observers attributed the election results of 2011 to the widespread use of social media to communicate discontent with government policies.⁸⁷ The government had been concerned about the use of the Internet for many years. In one celebrated case it harassed the operator of a website to the point that the site had to close down.⁸⁸ It blocked access to one hundred sites offering pornography “as a symbolic gesture but declared that it would not ban any political site.”⁸⁹ But, in general the government took what it called a “light touch” approach to the Internet, focusing on websites that contained “sexual content and material harmful to racial and religious harmony.”⁹⁰ Cherian George lists some categories of websites operating in Singapore as of 2006: sites of opposition parties; sites promoting free speech; and sites of a diverse set of other “civil society groups,” including those advocating gay rights, religious and linguistic groups “claiming fair[] treatment,” and some international groups such as Falun Gong.⁹¹ The government commissioned a report on new media, delivered in 2008.⁹² With respect to “[o]nline [p]olitical [c]ontent,” the “overarching intent” behind the commission’s regulations was “to liberalise existing regulations to encourage active, balanced online political discussion while minimising the adverse effects that such changes could bring.”⁹³ The commission specifically recommended that “individuals . . . and political parties that provide any programme for the propagation, promotion or discussion of political or religious issues relating to Singapore” on websites not be required to register.⁹⁴

⁸⁶ RODAN, *supra* note 76, at 107.

⁸⁷ See, e.g., LIM, *supra* note 63, at 5 (listing “the tremendous power of the Internet” among the reasons for the election results); Terence Lee, *Mainstream Media Reporting in the Lead-Up to GE2011*, in VOTING IN CHANGE: POLITICS OF SINGAPORE’S 2011 GENERAL ELECTION 131, 132 (Kevin YL Tan & Terence Lee eds., 2011) (observing that the “new media continued its transition from being marginal and alternative to being mainstream”).

⁸⁸ See GEORGE, *supra* note 32, at 99–119 (describing the events involving Sintercom).

⁸⁹ *Id.* at 56.

⁹⁰ *Id.* at 73.

⁹¹ *Id.* at 80–81.

⁹² See ADVISORY COUNCIL ON THE IMPACT OF NEW MEDIA ON SOC’Y, ENGAGING NEW MEDIA, CHALLENGING OLD ASSUMPTIONS (2008).

⁹³ *Id.* at 15.

⁹⁴ *Id.* at 16. It also recommended that “the symbolic ban on 100 websites should be lifted. . . . While there is merit in symbolism, it becomes counterproductive when parents are given a false sense of security.” *Id.* at 22. See also Hor, *supra* note 36, at 274 (describing the availability on websites of videos that had been banned in Singapore).

In 2013, the government adopted a new policy that would require websites that “report regularly on Singapore news and attract at least 50,000 visitors a month” to register and pay a substantial fee for a license.⁹⁵ According to reports, the policy would “affect[] 10 Web sites . . . including Yahoo news”;⁹⁶ the other nine were reportedly state owned.⁹⁷ Whether this is a significant expansion of existing regulations remains to be determined. Much will depend on definitions and enforcement. For example, fifty thousand visitors worldwide is a tiny number, fifty thousand Singaporean ones is not, and “reporting” on news and commenting on Singapore politics might be different activities.

Writing in 2006, Cherian George observed in connection with the new media that “things are getting interesting at the margins” and that it was “quite possible that intelligent, incremental changes at the center will succeed in preserving the status quo.”⁹⁸ That appears to be the government’s strategy. Whether it will succeed, or whether the government will conclude that stronger regulatory controls are needed, remains to be seen.⁹⁹

2. *Freedom of Expression Overall: An Assessment*

Singapore is clearly not a civil libertarian paradise of free expression. Yet, that is an inappropriate standard for assessing whether Singapore’s regulation of free expression conforms to the perhaps modest requirements of normative constitutionalism, as such constitutionalism is instantiated in nations generally regarded as constitutionalist. Each of the regulations Singapore places on freedom of expression has its counterpart in such nations, with the possible exception of the Singaporean rule that libel damages escalate when a high official is the target of false statements.¹⁰⁰ And, it seems that none of the regulations is enforced with a stringency that their terms appear to license. Such a “slice and dice” or disaggregated approach

⁹⁵ See *Singapore Clamps Down on News Web Sites*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/business/global/singapore-clamps-down-on-news-web-sites.html?pagewanted=print>.

⁹⁶ *Id.*

⁹⁷ See Heather Tan, *Singapore to Require News Websites to be Licensed*, THE BIG STORY (May 29, 2013, 4:40 AM), <http://bigstory.ap.org/article/singapore-news-websites-require-licenses>.

⁹⁸ GEORGE, *supra* note 32, at 223–24.

⁹⁹ See Cherian George, *Internet Politics: Shouting Down the PAP*, in VOTING IN CHANGE, *supra* note 87, at 149 (describing an earlier attempt to regulate websites by requiring disclosures and limitations on foreign funding that caused few problems because the website’s operators had already decided to operate on a volunteer basis).

¹⁰⁰ Even that rule might be defensible in the way Singapore’s courts have defended it, at least within the framework of common law development of libel law. See, e.g., Lee, *supra* note 37, at 313–18 (describing several defamation suits brought against opposition politicians).

is almost certainly inappropriate as well, perhaps something like a fallacy of decomposition.¹⁰¹ The cumulative effect of small regulations might be substantial. And, the sword of Damocles metaphor, captured in the theory of freedom of expression as the “chilling effect” doctrine, explains why the mere existence of regulations with a theoretically broad reach can have troubling effects on the actual practices of freedom of expression.¹⁰² So, for example, a Singaporean informant suggested that the out of bounds markers have shifted substantially, broadening the domain of permissible dissent. Yet, without clarity from the authorities, potential dissidents will necessarily be concerned that some activity will fall outside the new markers, or that, provoked by the demonstration, the authorities will “shift” the markers in a restrictive direction.¹⁰³

D. Election Rules

Singapore has a one-house legislature. Initially its members were elected from single-member districts.¹⁰⁴ This posed a risk to the PAP: an opposition party might gain enough support in a single district, or in a few, to elect one or more non-PAP members. As PAP leaders presented the problem, though, it was as much a question of social order as of political domination. The possible “swing” constituencies were ethnically distinctive, and, according to the PAP, this raised the possibility of ethnically based parties whose programs would disrupt the social stability that, PAP leaders asserted, had been so painfully achieved.¹⁰⁵ Such parties, of course, would also capitalize on minority resentment at the lack of parliamentary representation to become strong enough to offer a real challenge to the PAP’s dominance.

¹⁰¹ Cf. ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 9 (2011) (describing “the fallacy of composition,” which is “to assume that if the components of an aggregate . . . have a certain property, the aggregate . . . must also have that property”). Here the components lack a property but the aggregate might have it.

¹⁰² The Singaporean government’s refusal to specify where “out of bounds markers” are set is a near-perfect example of the mechanism by which the chilling effect occurs. As Justice Brennan put it in an early chilling-effect case, without clarity a person will “steer . . . wide[] of the unlawful zone.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that the State must bear the burden of proof that an applicant for a tax exemption advocated seditious action).

¹⁰³ I use scare quotes because one effect of the authorities’ failure to identify the out of bounds markers is that no outsider can know before the event where the markers actually are.

¹⁰⁴ See A HISTORY OF SINGAPORE, *supra* note 21, at 395.

¹⁰⁵ See Yeo Lay Hwee, *Electoral Politics in Singapore*, in ELECTORAL POLITICS IN SOUTHEAST AND EAST ASIA 226 (Aurel Croissant et al. eds., 2002) available at <http://library.fes.de/pdf-files/iez/01361007.pdf>.

After J.B. Jeyaretnam won election from a single-member constituency in 1981, the government responded by changing the rules.¹⁰⁶ It created multimember constituencies, known as “group representation constituencies” (GRCs), targeting the swing constituencies by including them—but not others—in such constituencies.¹⁰⁷ Accompanying this change, the government required that the slates for multimember constituencies be ethnically balanced. Parties present lists of candidates for each GRC, and at least one member of the list must be non-Chinese, typically Malay or Indian.¹⁰⁸ Voters cast their ballots for party lists, not individual candidates.¹⁰⁹ Again, this design has an obvious good-government rationale, that of ensuring representation of Singapore’s minorities.¹¹⁰ The dominant Chinese population might win every parliamentary seat were all districts to be single-member, and even if minorities dominated in a few districts their representatives would be swamped in the Parliament as a whole. The result of creating the GRCs, undoubtedly intended, was that the PAP won the district-wide elections in these constituencies, with a slate that did include minority representation. Even after the 2011 elections, the GRCs produced near-total domination of the PAP in Parliament.¹¹¹

The domination was only near total, though, because of two other innovations in representation. The constitution was amended to require the appointment of a limited number—at present, up to nine—of “non-constituency members” (NCMPs) to Parliament.¹¹² NCMPs are “third class parliamentarians.”¹¹³ They can debate all mat-

¹⁰⁶ For background on these developments in the Singaporean election system, see Li-Ann Thio, *The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study*, 1993 SING. J. LEGAL STUD. 80, 96–102.

¹⁰⁷ In 2011, according to the Singapore Parliament’s website, there were fifteen multimember constituencies and twelve single-member constituencies. See *Group Representation Constituency*, http://en.wikipedia.org/wiki/Group_Representation_Constituency (providing an overview of the GRC system); *Members of Parliament*, PARLIAMENT OF SINGAPORE, <http://www.parliament.gov.sg/members-parliament>.

¹⁰⁸ See Hwee, *supra* note 105, at 206. The ethnicity is specified in the regulations governing the specific election.

¹⁰⁹ See *id.*

¹¹⁰ According to Kevin Tan, the GRC system was introduced “with the avowed object of ensuring the representation of ethnic minorities in parliament.” Kevin YL Tan, *Legal and Constitutional Issues*, in VOTING IN CHANGE, *supra* note 87, at 52.

¹¹¹ Li-Ann Thio observes that the GRC system was also introduced for the purpose of recruiting new leadership to the PAP, allowing candidates who might not want to risk losing an election to ride the coattails of a popular politician at the head of the GRC ticket. See Li-Ann Thio, *The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Commission*, in EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION 7, 36–37 (Li-Ann Thio & Kevin Y.L. Tan eds., 2009).

¹¹² CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 39(1)(b). The number actually appointed depends on the number of opposition members elected in constituencies. So, for example, because the opposition won six seats in the 2011 elections, only three NCMPs were appointed to the Parliament.

¹¹³ Thio, *supra* note 31, at 46.

ters and vote on most legislation, but not on the budget, and their participation in committee work is limited.¹¹⁴

The stated rationale for the NCMP system was “to ensure that there will be a minimum number of opposition representatives in Parliament and that views other than the Government’s can be expressed in Parliament.”¹¹⁵ Under the NCMP system, appointment is based on a formula requiring the appointment of the “best losers”—that is, the largest vote gatherers in constituencies who nonetheless failed to be elected from a constituency.¹¹⁶ These are typically, though not necessarily, the leaders of the main opposition groups. Most have gone along with these appointments, albeit reluctantly.

A second innovation was the creation in 1990 of a limited number—again, up to nine—of “nominated members” (NMPs). As the name indicates, these are people from outside of politics—academic leaders, leaders in the business community, and the like—appointed by the government to serve in Parliament.¹¹⁷ The rationale for having NMPs is to break out of the possibly self-reinforcing effects of “group think” within political circles (which is to say, within the PAP) and relatedly to provide the opportunity for new ways of thinking to enter the political system. The system also responded to a widespread perception among PAP leaders that important segments of civil society were so disaffected from politics that they were not contributing as much as they could to the nation’s governance.¹¹⁸ The NMPs were a symbol of the government’s interest in the contributions civil society could make, signaling to the population generally that the government was open to new ways of thinking. More cynically, Garry Rodan suggests, “[t]his functional representation . . . encouraged non-governmental organizations . . . to take their politics down a non-partisan path though within a PAP-controlled institution,” apparently on the theory that NGOs hoping to have their members chosen as NMPs would abstain from open political opposition.¹¹⁹

¹¹⁴ See *id.* at 46–47 (discussing the limited roles of NCMPs).

¹¹⁵ See *Members of Parliament*, *supra* note 107.

¹¹⁶ For an example of the “best loser” voting scheme in a comparative context, see Adam Aft & Daniel Sacks, *Mauritius: An Example of the Role of Constitutions in Development*, 18 U. MIAMI INT’L & COMP. L. REV. 105, 114–15 (2010).

¹¹⁷ CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 39(1)(c). Formally the appointments are made by the President (elected separately from the executive government) on the advice of a parliamentary select committee. *Id.* So far the President has not exercised independent judgment on these appointments.

¹¹⁸ See Thio, *supra* note 106, at 99.

¹¹⁹ Garry Rodan, *Singapore “Exceptionalism?: Authoritarian Rule and State Transformation*, in *POLITICAL TRANSITIONS IN DOMINANT PARTY SYSTEMS: LEARNING TO LOSE* 231, 242 (Edward Friedman & Joseph Wong eds., 2008). The NMPs are not truly “functional” representatives because there is no obligation for the government to appoint NMPs who are representatives of specific segments of civil society.

The government's interest in creating NCMPs and NMPs has another source—an interest in co-opting potential opposition.¹²⁰ As one NMP told me, serving in Parliament gave the member a greater understanding of the government's difficulties in managing a multi-ethnic city-state. An NCMP leader of the opposition Workers Party also indicated in 2007 that serving in Parliament at least rounded off the hard edges of the party's positions.¹²¹

Other aspects of Singapore's electoral system, common in other regimes as well, reinforce the PAP's ability to retain power. The official election period is quite short—nine days between the opening of the campaign and the election—and formal campaigning is prohibited outside that window, although opposition parties continue to operate and distribute information about their positions.¹²² The government also engages in classic gerrymandering by redrawing constituency boundaries in anticipation of new elections, with an eye to diluting the opportunity for an opposition slate to gain a majority in a GRC.¹²³

E. Singapore's Constitutionalism: Characterization and Assessment

Pluralizing the concept of constitutionalism while preserving some degree of analytic clarity poses problems of characterization. As the previous discussion of the “slice and dice” or disaggregated analysis of civil liberties in Singapore suggests,¹²⁴ the most paradigmatic liberal constitutionalist nations regularly fall short of achieving full liberal rights along one or more dimensions. Despite those shortfalls, the nations still ought to be characterized as falling within the category of liberal constitutionalist nations. When, though, do the shortfalls become great enough to warrant placing the system in a different category? More concretely, is Singapore a seriously flawed liberal constitutionalist nation, or an authoritarian constitutionalist one?

¹²⁰ See Thio, *supra* note 31, at 31 n.163 (2002). Professor Thio served as an NMP from 2007 to 2009. Li-Ann Thio, NAT'L UNIV. OF SING. LAW, http://law.nus.edu.sg/about_us/faculty/staff/profileview.asp?UserID=lawtla (last visited Nov. 4, 2014).

¹²¹ See Sylvia Lim, *The Future of Alternative Party Politics: Growth or Extinction?*, in RENAISSANCE SINGAPORE?, *supra* note 70, at 239. Lim was elected to Parliament in 2011. See Ms. Sylvia Lim CV, PARLIAMENT OF SINGAPORE, <http://www.parliament.gov.sg/mp/sylvia-lim?viewcv=Sylvia%20Lim> (last visited Nov. 3, 2014).

¹²² As a legal matter, campaign periods must range from nine days to eight weeks, but since 1963 campaign periods have been limited to nine days. Hwee, *supra* note 105, at 211. Outside of these campaign periods, opposition parties are “comparatively dormant,” as they are “very limited in structure and resources.” *Id.* at 215.

¹²³ See *id.* at 219. Opposition parties charge that the results of boundary redrawing are announced shortly before elections, affording them insufficient time to develop campaigns tailored to specific constituency interests. *Id.*

¹²⁴ See *supra* text accompanying notes 100–01.

As I indicated earlier, Singapore's constitutional system is far from being that of a liberal democracy, and it clearly has authoritarian overtones. The use of "swords of Damocles" and the internalization of constraint by some as a result of long-standing and well-known instances of coercion of others may allow the government to assert control without obvious arbitrary exercises of power. Yet, that point can be put another way: perhaps we could describe Singapore's authoritarianism as being exercised with a relatively light hand. Rather than electoral fraud, there is gentle and completely transparent manipulation of the formal electoral system. With some difficulty, political opponents can organize reasonably effectively.¹²⁵ And, of course, while worrying about being forced into bankruptcy is not something opposition leaders welcome, neither is it much like being concerned, on waking up at home in the morning, that one will be spending the evening in prison. As Kenneth Paul Tan puts it, "Singapore is not a crudely authoritarian state, but neither does it fit neatly [into] the familiar theories of liberalization and democratization."¹²⁶

What might explain Singapore's authoritarian constitutionalism? All sympathetic accounts of the system, whether from the PAP or independent academics, point to the government's need to preserve ethnic and religious harmony. In Michael Hor's words, "The need to preserve the peace between the racial components of Singaporean society is never far from official thinking."¹²⁷ As I have heard it described in quasi-racist terms, Singapore was "an island of red in a sea of green."¹²⁸ In a well-known speech, Prime Minister Lee Hsien Loong described "the worst possible" outcome of an election as a "society split[] based on race or religion," which would "divide the society and that is the end for Singapore."¹²⁹ As indicated above, some of the system's institutional arrangements might plausibly be explained with reference to the need to manage ethnic tensions, with collateral

¹²⁵ See *supra* text accompanying notes 106–23.

¹²⁶ Kenneth Paul Tan, *Acknowledgements*, in *RENAISSANCE SINGAPORE?*, *supra* note 70, at v.

¹²⁷ Hor, *supra* note 36, at 281. See also Rahul Sagar, *A Moderate Regime: What Can We Learn from Singapore?* 16 (unpublished manuscript) (on file with author) (discussing how the government attempts to maintain racial harmony).

¹²⁸ "Green" here is rather clearly a reference to the Muslim populations in Indonesia and Malaysia, with "red" more obscurely referring to ethnic-origin Chinese, Buddhists, and Christians in Singapore.

¹²⁹ Lee Hsien Loong, Prime Minister, Leadership Renewal: The 4th Generation & Beyond, Speech at Kent Ridge Ministerial Forum (Apr. 5, 2011), available at http://www.pmo.gov.sg/content/pmosite/mediacentre/speechesinterviews/primeminister/2011/April/Speech_by_Prime_Minister_Lee_Hsien_Loong_at_Kent_Ridge_Ministerial_Forum_2011.html.

(and intended) effects on the government's self-preservation.¹³⁰ Yet, one might fairly wonder whether the scope of the restrictions on freedom is actually limited in ways that this justification would support. In particular, the government appears to treat all forms of political opposition as sufficiently likely to lead to racial or religious division that it is justified in restricting political opposition as such. Perhaps the government is right, given Singapore's situation, but one might view its actions more skeptically as motivated by an instinct for political rather than national self-preservation.¹³¹

With this overview of Singapore's constitutionalism in hand as an illustration of the possible value of pluralizing the notion of constitutionalism, I turn to an examination of some categories that might help organize such a pluralized notion.

II

ABSOLUTIST AND MERE RULE-OF-LAW CONSTITUTIONALISM

A. Absolutist Constitutionalism

Consider first the possibility of absolutist constitutionalism: imagine an absolute monarchy in which the monarch's decisions are authoritative.¹³² The monarch makes decisions after receiving advice from a group of advisers the monarch has personally chosen. The monarch chooses the advisers after consulting widely in the nation, by holding discussion sessions with the nation's citizens.¹³³ The monarch makes it clear that the advisers provide only advice and that the monarch will make the final decision. There are no mechanisms for formally challenging a decision once taken. But, the monarch allows widespread discussion of policy options before decisions are taken and criticism of the monarch's choices afterwards. Sometimes such criticisms lead the monarch to modify the chosen policy, but not always. The monarch's decisions are typically motivated by a combination of concerns—that the decision not undermine and perhaps actually enhance the monarchy's stability (defined as the continuation of governance by the monarch and the designated successors), and that the decision promote the welfare of the nation's citizens as the monarch understands their welfare. Finally, the monarch strives to

¹³⁰ The same might be said of some substantive policies, such as those dealing with the allocation of improvements in public services. For a discussion, see *infra* text accompanying note 303.

¹³¹ Cf. BARR & SKRBIŠ, *supra* note 6, at 252 (suggesting that "Singapore's two main national myths—multiracialism and meritocracy—are chimeras whose main purpose is to facilitate and legitimise rule by a self-appointed elite, dominated by middle-class Chinese in general, and by the Lee family in particular").

¹³² The example is drawn from Bhutan's recent history, but I emphasize that it is stylized, not historically accurate.

¹³³ Or, today, by inviting widespread participation in some sort of Internet forum.

imbue potential successors—children, members of the more extended royal family—with the values that animate the monarch’s own choices.

This is an absolute monarchy, not a constitutional monarchy on the model of Great Britain or Denmark, but a monarchy that should be taken to satisfy the most minimal requirements of normative constitutionalism,¹³⁴ and probably quite a bit more than that. The example suggests that McIlwain’s dichotomization between will and law misses something: the absolute monarch exercises a will, but not despotically (even in the long run), and does not engage in arbitrary rule even though the monarch is not limited by law.¹³⁵ If that is correct, the example suggests normative constitutionalism may require a substantial degree of freedom of expression and some informal mechanisms for determining what a nation’s citizens believe to be in their interests, but not, importantly, a full-fledged system of democratic representation and accountability.

B. Rule-of-Law Constitutionalism

1. *The Basic Requirements*

Mere rule-of-law constitutionalism is another variant. Mere rule-of-law constitutionalism is a system that satisfies such core rule-of-law requirements as publicity, prospectivity, and generality.¹³⁶ Consider a

¹³⁴ See *supra* Part I.

¹³⁵ To be clear: the monarch is not *institutionally* constrained to refrain from acting arbitrarily, and for that reason one might say that the monarch’s behavior is not “constitutionalist.” Whether restraint due to socialization rather than institutions ought to be regarded as enough to qualify a regime as constitutionalist is an interesting and important question for the pluralizing project. Reflecting on the literature on political constitutionalism, at present I am inclined to think that socialization that substantially reduces the risk of arbitrary action should count as constitutionalist. For examples of that literature, see generally RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 3–12 (2007) (critiquing legal constitutionalism and advocating for political constitutionalism). See also Tom Campbell et al., *Introduction*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 7–9 (Tom Campbell et al. eds., 2011) (discussing a skeptical approach to human rights and judicial institutions).

¹³⁶ The list is of course taken from LON FULLER, *THE MORALITY OF LAW* 38–39 (1964). Fuller includes eight items in his list of the rule of law’s characteristics, and I limit my example to those in the text solely for expository reasons. Fuller appears to believe that legal systems that conform to the rule of law are highly likely (or even certain) to conform as well to full normative constitutionalism understood as having substantial substantive content, incidentally though not definitionally or deductively. See also T.R.S. Allan, *Accountability to Law*, in *ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION* 77, 85 (Nicholas Bamforth & Peter Leyland eds., 2014) (“Compliance with the rules of natural justice . . . is as important an aspect of the rule of law as the conformity of enacted rules with the constraints of formal or procedural legality (generality, clarity, publication, prospective effect and so forth).”). But see *id.* at 90 (suggesting that this analysis is “an attempt to understand [aspects of] . . . the specific conditions of the British legal and political order”). For a recent contribution to the discussion of whether the concept of the rule of law necessarily incorporates some fundamental human rights, see Peter Rijpkema, *The Rule*

stylized example of a system that satisfies those requirements but is not fully normatively constitutionalist.¹³⁷ The government arrests a critic, charging him with violating a statute prohibiting the public distribution of statements likely to cause racial disharmony, by publishing a newspaper editorial criticizing the government's policies on affirmative action. The judge before whom the prosecution is brought dismisses the prosecution on the ground that the editorial did not violate the statute because it was unlikely to cause racial disharmony. The judge orders the critic released. As the police are completing the paperwork to accomplish the release and then putting the critic in a taxicab to take him home, the government passes a new statute making it a crime to criticize government policies on affirmative action. The statute defines "criticizing" to include the failure to withdraw from public access statements made before the statute's enactment. When the critic steps out of the taxicab at his house, the police arrest him for violating the new statute.¹³⁸ Holding the critic liable is, I believe, consistent with the minimal requirements of the rule of law: the new statute is public, general, prospective, and capable of being complied with.¹³⁹ But, I think it clear that the government's action is inconsistent with full normative constitutionalism.

Now generalize the government's behavior, so that the example is not a simple one of a violation occurring within a normatively constitutionalist system but is rather a typical example: the government is alert to challenges, does its best to anticipate them, and alters the laws in place whenever it discovers a problem but does so consistent with the requirements of publicity, generality, prospectivity, and the like. We then have mere rule-of-law constitutionalism.¹⁴⁰ As with absolutist

of Law Beyond Thick and Thin, 32 L. & PHIL. 793, 805–06 (2013) (arguing that the criteria Fuller and others identify as defining characteristics of the rule of law are predicated on a conception of those subject to law's directives that implies that they have fundamental rights). This Article is not the place to develop my view that this is mistaken, and that the rule of law is best understood as a form of regularized order and nothing more. I note, though, that the very enterprise of describing mere rule-of-law and authoritarian constitutionalism rests on that view.

¹³⁷ The example is loosely based on an incident in Singapore's constitutional history, modified to bring out "mere rule-of-law" features. The case on which it draws is *Chng Suan Tze v. Minister of Home Affairs*, [1989] 1 MLJ 69 (Sing.). For details on the *Chng* case, see Thio, *supra* note 31, at 58–60.

¹³⁸ Assume that the critic has a cell phone with him in the taxicab, so that he could receive notice of the new statute's adoption and could direct supporters to withdraw the editorial from public availability.

¹³⁹ Fuller's list requires some degree of stability in law. See FULLER, *supra* note 136, at 39. A single modification provoked by a newly perceived problem would not, I think, be inconsistent with that requirement.

¹⁴⁰ In my judgment, Gordon Silverstein, *Singapore: The Exception that Proves Rules Matter, in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 73, 73–101 (Tom Ginsburg & Tamir Moustafa eds., 2008), ascribes rule-of-law constitutionalism, not authoritarian constitutionalism, to Singapore. See also Carlo Guarnieri, *Judicial Independence in Au-*

constitutionalism, mere rule-of-law constitutionalism conforms to some of McIlwain's criteria but not others: the government is limited by law and, to the extent that it responds to challenges only after the event, perhaps we ought not describe it as completely despotic, and yet the government seems not truly limited or nonarbitrary at least in potential.

I have not described the mechanism by which the rulers of a mere rule-of-law regime are chosen. But, they *could* be chosen in reasonably free and fair elections. Both political theory and empirical observation suggest that we cannot rule out in advance the possibility that large, even overwhelming majorities within a defined population will prefer illiberal policies.¹⁴¹ If they do, mere rule-of-law constitutionalism can be created and sustained through reasonably free and fair elections. We can then describe the systems as illiberal democracies.¹⁴²

2. *A Note on Judicial Independence as a Component of Mere Rule-of-Law Constitutionalism*

Jeremy Waldron and others have suggested that “mere” rule-of-law constitutionalism requires more than prospectivity and the like. For Waldron institutions associated with an independent judiciary are essential components of the most minimal rule-of-law state.¹⁴³ Yet, even adding independent courts to the requirements does not add much, in my view, once we examine the idea of judicial independence in more detail.¹⁴⁴ First, the desideratum is not judicial independence

thoritarian Regimes: Lessons from Continental Europe, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 234, 243, 245 (Randall Peerenboom ed., 2010) (defining “a ‘thin’ version of the rule of law” to mean that “political power must follow general rules and, although it can alter those rules, it can do so only following previously enacted procedures,” and relying on Silverstein, *supra*, for the suggestion that Singapore has a “thin” version of the rule of law).

¹⁴¹ See, e.g., Graham Walker, *The Idea of Nonliberal Constitutionalism*, in ETHNICITY AND GROUP RIGHTS 154, 155–56 (Ian Shapiro & Will Kymlicka eds., 1997) (describing such difficulties in the post–Cold War democratic transition).

¹⁴² See ZAKARIA, *supra* note 11, at 17–21. Graham Walker, *supra* note 141, at 154–56, uses the term in a philosophically grounded account that treats “liberal constitutionalism” as resting on a philosophical commitment to neutrality among views of the good and a consequent commitment to purely individual rights. As a result, he treats Israel as a (possibly) illiberal constitutional state. See *id.* at 159. For my more institutionally oriented purposes, Graham’s account sweeps too much into the category of illiberal constitutionalism. See also *infra* Part III.C.

¹⁴³ Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in GETTING TO THE RULE OF LAW 3, 13–14 (James Fleming ed., 2011). In the text I discuss only judicial independence, but I believe that other features of Waldron’s account either are parasitic on judicial independence or are subject to difficulties analogous to the ones I discuss.

¹⁴⁴ The next few sentences summarize an argument made in more detail in Mark Tushnet, *Judicial Accountability in Comparative Perspective*, in ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION 57, 68–72 (Nicholas Bamforth & Peter Leyland eds., 2014).

alone but rather judicial independence coupled with accountability to law.¹⁴⁵ Accountability to law, in turn, consists in making decisions that are palpably legal—that rely on materials and use methods of reasoning that all well-socialized lawyers would treat as legal in nature. On this understanding of accountability to law, such accountability necessarily has a sociological component. In some legal systems, decisions referring to revealed truths would be palpably legal, in others not.

Consider then a legal system in which judges are generally socialized into accepting positivist accounts of law as correct. In such a system Waldron's requirement that a rule-of-law state have independent judges accountable to law¹⁴⁶ adds little to the basic requirements of prospectivity and the like, at least as long as the judges can dispose of their cases solely with reference to positive law.

But, perhaps even positivist judges will regularly confront cases falling into the interstices of positive law. A Singaporean case is instructive. The background is the famous British case of *Liversidge v. Anderson*.¹⁴⁷ That case involved an internal security statute authorizing the Home Secretary to place in detention camps people who he had "reasonable cause to believe [had] hostile associations."¹⁴⁸ The court of appeal held that the statute required only that the Home Secretary have such a belief—a so-called "subjective" test—and did not require that the belief be objectively reasonable.¹⁴⁹ The Singaporean parallel is *Chng Suan Tze v. Minister of Home Affairs*.¹⁵⁰ The relevant statute there authorized detention if the President was "satisfied" that detention was necessary to prevent the person from disrupting national security.¹⁵¹ The Singapore Court of Appeal held that it was insufficient that the President be subjectively satisfied that the detainee posed a threat. Rather, there had to be some objective basis for that belief.¹⁵² The problem in *Liversidge* and *Chng* arises in what I have called the interstices of positive law—here, the failure of the positive law to set out whether the test is subjective or objective.

Even a positivist judge can infuse substance—here, a preference for liberty—in these interstices. But, in a mere rule-of-law state, the government can fill the gap once it is brought to its attention, as indeed happened in Singapore: Parliament responded to the *Chng* decision by amending the relevant statute to make it clear that the test was

¹⁴⁵ Without the latter, independent judges can act arbitrarily and so anticonstitutionally.

¹⁴⁶ See Waldron, *supra* note 143, at 6.

¹⁴⁷ [1942] A.C. 206 (H.L.) (appeal taken from Eng.).

¹⁴⁸ *Id.* at 206–07.

¹⁴⁹ See *id.* at 235.

¹⁵⁰ [1989] 1 MLJ 69 (Sing.).

¹⁵¹ See Internal Security Act, Cap. 143, 1985 Rev. Ed. Sing., § 8(1).

¹⁵² [1989] 1 MLJ at 70.

a purely subjective one.¹⁵³ Thereafter a positivist judge would be bound to follow the positive law.

In sum, judicial independence is an important additional component to mere rule-of-law constitutionalism only if we assume that judges are not positivists.¹⁵⁴ That might be true in some societies, but it is rather clearly a contingent feature of judging that will depend on a range of sociological considerations, including such matters as how the judges are trained and promoted.

3. *Is Mere Rule-of-Law Constitutionalism “Constitutionalism” in the Proper Sense?*

One could of course stipulate that the term “constitutionalism” applies only when some substantive requirements are satisfied. What substantive requirements, though? Waldron offers the following list to contrast it with the formal requirements of prospectivity and the like *and* with the procedural requirement of an independent but accountable judiciary: “Respect for private property; Prohibitions on torture and brutality; A presumption of liberty; and Democratic enfranchisement.”¹⁵⁵ The point of the contrast is to suggest that *any* substantive requirements are going to be substantially more controversial than the minimal formal and procedural ones. Add anything of substance, in short, and you have more than the mere rule of law.

Still, perhaps the mere rule of law is not constitutionalist at all. Here I revert to McIlwain’s definition, that constitutionalism requires (no more than) restraint on the arbitrary exercise of power.¹⁵⁶ Proponents of the mere rule of law argue, I believe, correctly, that it does constrain *arbitrariness* in the sense of whim and caprice. On McIlwain’s definition, the mere rule of law is therefore constitutional-

¹⁵³ See REPUBLIC OF SINGAPORE GOVERNMENT GAZETTE, ACTS SUPPLEMENT, No. 2 of 1989, Internal Security (Amendment) Act 1989, *available at* <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%22dff584d2-1d5d-4d9d-8aac-2f8d16dbdd3%22%20Status%3Apublished%20Depth%3A0%20TransactionTime%3A20140114000000;rec=0>. For an analogous example, see TEO SOH LUNG, BEYOND THE BLUE GATE: RECOLLECTIONS OF A POLITICAL PRISONER 188–94 (2011) (describing the author’s momentary release from detention because of a technical defect in the detention order, followed immediately by serving her with a new detention order in which the technical defect was corrected). The cited book is a memoir of the detention of a participant in the so-called “Marxist Conspiracy,” discussed at *supra* note 85 and accompanying text.

¹⁵⁴ I note two qualifications to the argument developed in the text. (1) Perhaps a direct face-to-face confrontation with a litigant will push even a positivist judge into responding in a nonpositivist way. (2) Perhaps substantive decisions made in the interstices of positive law will initiate a dynamic that adds more and more substance to the purely procedural elements of mere rule-of-law constitutionalism. For a discussion of a related possibility, see *infra* Part III.E.2. I am sufficiently skeptical about both of these possibilities to regard them as, at best, modest qualifications to the overall argument.

¹⁵⁵ Waldron, *supra* note 143, at 7.

¹⁵⁶ See McILWAIN, *supra* note 7, at 21.

ist. It is of course an exceedingly thin constitutionalism, but if we are willing to pluralize the idea of constitutionalism, even an exceedingly thin version might be a distinctive form of constitutionalism.

III

CONSTITUTIONS, COURTS, AND ELECTIONS IN AUTHORITARIAN SOCIETIES

Most of the scholarship by political scientists on constitutions in authoritarian regimes is analytically descriptive rather than normative,¹⁵⁷ although it is written against a normative backdrop: If constitutionalism entails limitations on government, and authoritarian regimes are ones in which government is unlimited, why do such regimes even have constitutions? Of course every regime has a *descriptive* constitution, some reasonably regular processes for policy development and conflict resolution.¹⁵⁸ Yet, the literature on hybrid regimes seems animated by an interest in understanding why such regimes have constitutions that appear to go beyond merely mapping out power relations within the government and yet are not mere shams.¹⁵⁹ For present purposes, even if this account of some motivations for this literature is inaccurate, analytic descriptions of constitutions in hybrid regimes illuminate some features of authoritarian constitutionalism.

¹⁵⁷ See, e.g., Zachary Elkins et al., *The Content of Authoritarian Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 141 (Tom Ginsburg & Alberto Simpser eds., 2014) (identifying common characteristics of authoritarian constitutions and comparing them to democratic ones); David S. Law & Mila Versteeg, *Constitutional Variation Among Strains of Authoritarianism*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra*, at 165 (providing a typology of constitutions and authoritarian regimes and hypothesizing about the constitutional choices of those regimes); Michael Albertus & Victor Menaldo, *Dictators as Founding Fathers? The Role of Constitutions Under Autocracy*, 24 ECON. & POL. 279 (2012) (describing a theory of why autocratic regimes adopt constitutions and discussing what purposes those constitutions might serve).

¹⁵⁸ For a discussion of the term “constitution” in a descriptive sense, see Mark Tushnet, *Constitution*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 18, at 217–18; see also Albertus & Menaldo, *supra* note 157, at 279 (arguing that autocrats adopt constitutions to specify the “rights” of members of the autocratic coalition, apparently using the term “rights” to refer to the prerogatives attached to the positions created by the constitution).

¹⁵⁹ On the idea of constitutions as maps of power, see H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 67 (Douglas Greenberg et al. eds., 1993) (arguing that “all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of power”) (emphasis omitted). The 1936 Constitution of the Soviet Union is the usual example of a sham constitution, but there have been many additional examples in recent years. For a general discussion, see Law & Versteeg, *supra* note 16, at 898–900.

A. Strategic Accounts of Courts and Constitutionalism Under Authoritarianism

The most prominent accounts of courts and constitutionalism in nations with authoritarian governments are strategic or instrumental.¹⁶⁰ These accounts purport to show that, from their own point of view, authoritarian leaders can stabilize their regimes and thereby ensure that they remain in power by creating independent courts or, more generally, by tying their own hands through constitutional restraints.¹⁶¹ To frame the discussion I use two texts, one dealing with constitutions in authoritarian systems and the other dealing with the role of courts in such systems.

Tom Ginsburg and Alberto Simpser argue that constitutions in authoritarian systems serve as “manuals” that ease coordination within the authoritarian ruling group, as “billboards” that convey information to foreign and domestic observers, and as “blueprints” that provide guidance for officials and subjects with respect to the actions they are required or allowed to take.¹⁶² Tamir Moustafa and Ginsburg catalogue the “functions of courts in authoritarian states”:

Courts are used to (1) establish social control and sideline political opponents, (2) bolster a regime’s claim to “legal” legitimacy, (3) strengthen administrative compliance within the state’s own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime.¹⁶³

In these strategic accounts, constitutions and courts serve authoritarian rulers’ goals by allowing them to make credible commitments and by increasing the cost of violating constitutional provisions. The general difficulty with these accounts is straightforward: rulers might want to make credible commitments,¹⁶⁴ but they cannot do so, pre-

¹⁶⁰ For the terminology, see, e.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 110 (1995) (referring to “strategically designed limitations on supreme power” and “restraints as *instruments* of princely authority”).

¹⁶¹ See, e.g., Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES*, *supra* note 157, at 1, 4–5 (discussing the function of constitutions in authoritarian regimes).

¹⁶² See *id.* at 5–8.

¹⁶³ Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW*, *supra* note 140, at 1, 4.

¹⁶⁴ See Elkins et al., *supra* note 157, at 141, 148 (“While authoritarians, at least those with long time horizons, may have less need for formal precommitment devices than would democrats . . . they still need to make credible promises to their supporters, and constitutions might be one mechanism for doing so.”).

cisely because they can alter the constitution whenever they want—and the target audiences know that the rulers can do so.¹⁶⁵

Consider, for example, the argument that violating promises made in a constitution is costly. The costs are said to take two forms. Constitutional provisions are entrenched, and altering them is more difficult than altering ordinary policy;¹⁶⁶ and, in Ginsburg and Simpser's words, constitutions are "hallowed vessels," and altering or violating them has a reputational cost.¹⁶⁷ But, constitutions always have provisions allowing amendment, and authoritarian rulers can readily satisfy whatever the amendment rule is. Suppose, for example, that ordinary legislation can be enacted by simple majority while constitutional amendments require a two-thirds majority. As the example of Singapore shows, authoritarian rulers typically have that majority in the legislature. Amending the constitution is no more costly procedurally than changing ordinary legislation. As to reputation, Ginsburg and Simpser note that authoritarian constitutions can be hollow shells as well as "hallowed vessels,"¹⁶⁸ and they offer no criteria that would allow the audience—the source of the reputational cost—to determine whether any specific provision is the latter rather than the former. As Gretchen Helmke and Frances Rosenbluth put it with respect to similar claims about judicial independence, "precisely because autocrats are especially well suited to control the risks associated with judicial independence, we are left wondering just who is fooled by such tactics."¹⁶⁹

A standard example involving courts is the creation of a seemingly independent constitutional court in Egypt under Anwar Sadat and Hosni Mubarak.¹⁷⁰ Those leaders faced domestic opposition and international skepticism about their policy of shifting Egypt from a semisocialist system to one committed to market liberalization. To assure international lenders that their capital would be protected against expropriation, the leaders created a constitutional court with

¹⁶⁵ For a similar observation, see Law & Versteeg, *supra* note 157, at 172 ("A regime may, of course, renege on [constitutional] concessions once challenges to its rule have subsided.").

¹⁶⁶ See Elkins et al., *supra* note 157, at 141, 149 ("Constitutions are typically . . . more entrenched than ordinary law, which means they are also more costly to change.").

¹⁶⁷ Ginsburg & Simpser, *supra* note 161, at 1, 10 (emphasis omitted).

¹⁶⁸ *Id.* at 10, 12.

¹⁶⁹ Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 358 (2009).

¹⁷⁰ See, e.g., TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND DEVELOPMENT IN EGYPT 102–03 (2007) (discussing how the Egyptian courts "expanded political rights for opposition activists").

the power to hold expropriations unconstitutional, and with judges independent of direct control by the regime.¹⁷¹

Putting the argument in general terms: authoritarian regimes have the power to expropriate property at will. Knowing that, investors will be reluctant to invest in the nation. The regime can provide investors with the assurance that their investments will not be expropriated by embedding a guarantee against the relevant kinds of expropriation in the constitution, and then by establishing courts to enforce that guarantee: “[B]y establishing a neutral institution to monitor and punish violations of property rights, the state can make credible its promise to keep its hands off.”¹⁷²

The difficulty, which arises in different forms with respect to each component of the functionalist or instrumentalist account, lies in explaining why the promise is a credible one, and is again exemplified by the Egyptian experience. The neutral institution—the combination of a constitution and a court enforcing the constitution—is said to make the promise credible. But, just as an authoritarian regime can revoke its promise when its rulers believe that doing so would be to their advantage, so can it eliminate the neutral institution at the same time. If the regime finds the institution useful for other purposes, it can manipulate the court’s jurisdiction and personnel,¹⁷³ or modify the constitution in a targeted way, to allow the institution to serve—at least momentarily—those other purposes.

Yet, at this point we can see a classic problem of unraveling. Investors learn that the promise was not credible when the regime eliminates the institution’s neutrality to allow expropriation. Observing that development, all those targeted by the other functions, such as securing legitimation or delegating controversial reforms, should anticipate similar responses whenever the constitution or the courts impede rather than promote the regime’s goals.¹⁷⁴ Knowing that, the targets should not give any special weight to the constitution and

¹⁷¹ See *id.* at 93; see also K. Shanmugam, *The Rule of Law in Singapore*, 2012 SING. J. LEGAL STUD. 357, 357 (“Foreign investment would only come if we could provide the necessary legal certainty. In that sense, the Rule of Law was for us not only an aspiration and an ideal (important in itself), but also a necessity borne out of exigency.”). When Shanmugam, Singapore’s minister for foreign affairs and minister for law, made this statement, he referred only to the rule of law, but I believe the statement can fairly be read to support an interpretation that goes beyond the “mere” rule of law.

¹⁷² Moustafa & Ginsburg, *supra* note 163, at 1, 8.

¹⁷³ See Steven Levitsky & Lucan Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCRACY 51, 56 (2002) (listing impeachment, bribery, extortion, and co-optation as techniques for manipulating the judiciary). I would add manipulation of jurisdiction to their list.

¹⁷⁴ See, e.g., Yu Xingzhong, *Judicial Professionalism in China: From Discourse to Reality*, in PROSPECTS FOR THE PROFESSIONS IN CHINA 78, 90–91 (William P. Alford et al. eds., 2011) (discussing the use of the courts by local administrators to “deal with ‘hard cases’ . . . to solve administrative headaches”). To the extent that the sources of the headaches know

courts even when the regime does not interfere with them. Manipulating the constitution or the courts' jurisdiction with respect to investment and expropriation reveals "the man behind the curtain" with respect to delegating controversial reforms as well.

Strategic arguments may account for the creation of seemingly independent courts,¹⁷⁵ but I suggest that these accounts are flawed because they do not take seriously enough two central features of authoritarianism: the authoritarian leader's substantive policy preferences need not be "steady," to use a term introduced by Stephen Holmes,¹⁷⁶ and the authoritarian leader has lawful power to alter constitutional provisions at will. Writing of Singapore, Ross Worthington makes the point: "[T]he Singapore constitution is essentially a plaything of executive whim; a rule book for running the school which the council of prefects, with the connivance of the headmaster, may change at will."¹⁷⁷

The general structure of my argument is this: if the authoritarian regime's preferences are "steady," the mechanisms of constitutionalism and courts do no work because the regime's immediate self-interest will lead it to refrain from actions that reduce the returns it anticipates to gain during the period when the preferences are stable. And, if the regime's preferences change, the mechanisms also do no work because the regime is free to change them to accommodate its new preferences.¹⁷⁸ That the regime is free to change its preferences is important because that freedom makes it impossible for the current beneficiaries of its constitutional restraints even to calculate the

that the local administrators are simply using the courts, it is unclear why they would divert blame from the administrators to the courts.

¹⁷⁵ See, e.g., Elkins et al., *supra* note 157, at 141, 160–61 (noting that authoritarian rulers need some independent institutions to maintain support).

¹⁷⁶ HOLMES, *supra* note 160, at 111 ("[L]imitations placed upon his caprice markedly increase his capacity to govern and to achieve his steady aims.").

¹⁷⁷ ROSS WORTHINGTON, GOVERNANCE IN SINGAPORE 68 (2003); see also STEPHEN HABER, ARMANDO RAZO & NOEL MAURER, THE POLITICS OF PROPERTY RIGHTS: POLITICAL INSTABILITY, CREDIBLE COMMITMENTS, AND ECONOMIC GROWTH IN MEXICO, 1876–1929, at 4 (2003) ("The theoretical problem is that the despot's commitment to protect property rights is purely volitional.").

¹⁷⁸ Perhaps there is a class of preference changes as to which the mechanisms would do some work—changes that the regime might desire to make at the moment but from which it will realize reduced returns thereafter. This is a classic problem of shortsightedness or *akrasia*, about which there is a large and difficult literature. For an introduction, see generally Sarah Stroud, *Weakness of Will*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), <http://plato.stanford.edu/archives/fall2008/entries/weakness-will/>. For present purposes I note that it is extremely difficult for individuals knowing of the possibility that they will be shortsighted to design institutions *for themselves* that will foreclose the possibility of making shortsighted decisions but not ones that, on considered reflection, will be thought appropriate. (The difficulty is that any such institution will have to identify two categories—shortsighted and therefore prohibited, and not shortsighted and therefore permitted—and at the moment of decision the decisionmaker will, by definition, place the decision in the second category.)

probability that the regime will continue to adhere to its preferences for some defined period. To revert to the Egyptian example: investors cannot know or even evaluate probabilistically when the regime's leaders will decide that, all things considered, they will be better off expropriating the investments and "take the money and run."¹⁷⁹ They therefore cannot rationally rely on the regime's current assurances, which in turn means that the regime cannot use those assurances for the assumed instrumental purposes.¹⁸⁰

Examining the Egyptian example in more detail illustrates the difficulty with purely instrumental accounts of courts and constitutions in authoritarian regimes.¹⁸¹ When the Egyptian constitutional court began to act against regime interests, Mubarak sharply limited its independence by packing the court with his supporters.¹⁸² Importantly, the investors who were supposed to be assured about expropriation could have anticipated this possibility from the outset. That is, given the regime's authoritarianism the possibility existed from the beginning that judicial independence would persist only as long as it served the regime's interests and that neither the constitutional constraints nor the constitutional court would tie the regime's hands were the regime to become interested in expropriation.¹⁸³

¹⁷⁹ Idi Amin (Uganda) and Zine el Abidine Ben Ali (Tunisia) are examples of dictators who did take the money and run, both to Saudi Arabia. Ethan Bronner, *Editorial Notebook: The Obscenely Easy Exile of Idi Amin*, N.Y. TIMES (Aug. 19, 2003), <http://www.nytimes.com/2003/08/19/opinion/editorial-notebook-the-obscenely-easy-exile-of-idi-amin.html>; Eileen Byrne, *Ben Ali's Family and Friends*, THE GUARDIAN (Jan. 13, 2012), <http://www.theguardian.com/world/2012/jan/13/ben-ali-family-friends-assets>.

¹⁸⁰ The argument in the text is an informal version of the "last period" problem that leads to unraveling in prisoners' dilemma games where one party has complete power to declare when the last period has occurred. See, e.g., Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CALIF. L. REV. 1281, 1284 (2003) (providing a background on repeated games).

¹⁸¹ For ease of exposition I use the example of guarantees against expropriation, but the argument holds with respect to other guarantees of constitutional rights.

¹⁸² For the details, see Clark B. Lombardi, *Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State*, 3 J. COMP. L. 234, 250–51 (2008).

¹⁸³ The strategic account makes sense only if we—or the "targets" of the strategy, here international investors—have a time horizon shorter than that of the authoritarian regime. If so, investors can get their money out before the regime's policy changes. But, the regime's time horizon is unknowable because at any moment the regime's leaders can take the money and run—that is, calculate that they will be better off by immediately converting all their political power into financial resources and "retiring" to some friendly location, than by retaining power so as to maintain incoming flows of financial resources. Perhaps many leaders of authoritarian regimes will make the latter choice, but investors—and citizens more generally—cannot know they will.

Why then do investors invest, especially in large-scale capital projects where the returns will come only over a long period? One possibility is irrationality on their part. Another is that they believe that the regime is interested in more than maximizing its leaders' personal returns (measured by some combination of power and income). That is, they believe that the regime's "steady" preferences include national economic development.

After sketching Holmes's argument and offering some criticisms of it, I turn to recent strategic accounts of *courts* in authoritarian societies and conclude this section with a discussion of strategic accounts of *constitutionalism's* benefits to authoritarian rulers.

B. Strategic Benefits of Constitutionalism to Absolutist Rulers

Holmes's work aims at uncovering some of the intellectual sources of the theory of liberal democracy. He analyzes the work of the "preliberal and nondemocratic theorist" Jean Bodin as the vehicle for laying out the now-familiar argument that liberal democracies can empower the people by taking some potentially contentious issues out of ordinary politics by placing them in a constitution that restricts the ordinary legislature's ability to modify the policy chosen by the constitution's framers.¹⁸⁴ Because Bodin was not a liberal democrat, Bodin's arguments, as presented by Holmes, were addressed to absolutist rulers: their absolutism could be enhanced by self-imposed restrictions on power. Holmes quotes John Plamenatz's description of the paradox: "the king could not rule efficiently without devices to retard his actions."¹⁸⁵

The structure of the argument is familiar, though not often laid out in full.¹⁸⁶ At time-1, when a constitution is adopted (or an absolutist ruler considers whether to tie his or her hands), the constitution makers know that there is a set of policy issues as to which their own judgments might not be best for all time: their own judgment is that they must leave some decisions open to modification in the future. Suppose they believe that their own judgments about the structure of the legislature and about tax and spending policy are within the set of judgments that might not be best for all time. Should they leave both issues open to modification? The hands-tying argument is that they need not, that by foreclosing reconsideration of one issue through ordinary legislation they make it possible to arrive at better policy on the second. Suppose that both the legislature's structure and tax and spending policy are open to modification by ordinary legislation. Political bargaining may lead to compromises with respect to both topics. But, if the issue of legislative structure is taken off the table by placing it in the constitution (even though the constitutionalized

But, if the regime's preference set can be expanded in that way, to generate an instrumental justification for constitutionalist commitments, we ought to consider the possibility that it can be expanded in addition to include a normative commitment to constitutionalism as such—in which case we would no longer need an instrumental account for constitutionalism in authoritarian states.

¹⁸⁴ HOLMES, *supra* note 160, at 100–01.

¹⁸⁵ *Id.* at 108 (citation omitted).

¹⁸⁶ *See id.* 113–20 ("In justifying the separation of powers, too, Bodin emphasizes its power-enhancing function.").

structure might not be better at time-2 than some politically available alternative), deliberations and bargaining over tax and spending policy might yield so much better outcomes with respect to those matters as to offset the inability to make improvements in the legislature's structure.¹⁸⁷

This structure of this argument makes sense, though I wonder how often the empirical predicates necessary for its success are actually satisfied. Note, though, that its success requires that there be policy costs associated with bargaining and deliberation over policy choices: the tradeoffs between policy on legislative structure and tax and spending policy yield worse policies on both matters (net) than would result from accepting a "good enough" legislative structure and devoting all the available political energy to tax and spending policy. On the face of things, the argument might seem inapplicable to absolutist rulers, who—one might think—need not engage in bargaining at time-2.

But, as Holmes points out, even absolutist rulers need some degree of cooperation from their subjects: "If a sovereign breaks his word too often and too frivolously . . . his word will become useless as a tool for mobilizing cooperation."¹⁸⁸ Barry Weingast developed this argument in some detail.¹⁸⁹ Weingast asks us to consider a leader who is not, for the moment, constrained in exercising power by any *legal* rules. Still, the leader may be constrained in practice because those over whom the leader rules have enough practical power to resist impositions with which they disagree. Ordinarily, no single subject will have enough power to overthrow the leader, but some groups might, if they can act together. Yet, they will have a problem coordinating their action, for standard reasons: each one will hold back, hoping that others will take the initiative and overthrow the leader, bringing to them—but not to the laggards—the costs of rebellion. They can coordinate their action if it is "common knowledge" that some action by the leader violates standards accepted by all (or most) subjects. Roughly, they all know that they all will treat some specific action by the leader as a signal that the time for rebellion has come. So, for

¹⁸⁷ I think that this argument works only on the assumption that the constitution's resolutions of the issues it takes off the table (allowing modification through an amendment process more difficult than the one used to enact ordinary legislation) remains "good enough" in this sense: at time-2 those resolutions are suboptimal relative to alternatives, but the benefits of allowing modification through ordinary legislation of the nonconstitutionalized policies offset the losses at time-2 associated with the inability to modify through ordinary legislation the constitutionalized ones.

¹⁸⁸ HOLMES, *supra* note 160, at 111. For a discussion of mechanisms for mobilizing cooperation other than "his word," see *infra* text accompanying notes 195–202.

¹⁸⁹ See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245–46 (1997). My description omits many technical details, but I do not think that doing so for expository purposes invalidates my basic point.

example, a single act of confiscation can be understood as a threat to the property of all. Generalized: some notion of constitutionalism, perhaps rather thin, provides a coordination mechanism by identifying actions by the leader that all (or enough) subjects will agree are “violations” that threaten them all. A written constitution can serve as a focal point for this coordination.¹⁹⁰

The difficulty with this argument is that leaders will rarely announce that they are “violating” agreed-upon rules. Many constitutional provisions will be stated in rather general terms—requiring “just” compensation for takings for public purposes,¹⁹¹ for example, the scare quotes indicating that sometimes a ruler might be able to represent the just compensation for an expropriation as zero. The constitution taken as a whole is likely to provide support—within itself—for legally plausible arguments that something a critic identifies as a “violation” is actually consistent with the system as a whole, and therefore no threat to the rule of law—and, importantly, therefore no threat to other members of the potential opposition coalition. If participants in the system cannot unambiguously identify actions as violations, the breaches of the constitution cannot serve as a signal that people should now coordinate cooperative action against the leader.¹⁹²

Some actions might be unambiguous, such as patently arbitrary imprisonment or systematic extrajudicial killings.¹⁹³ But, again, the

¹⁹⁰ For a version of this argument, see Ginsburg & Simpsen, *supra* note 161, at 1, 5. The authors describe an argument by Roger Myerson:

In the Exchequer, a panel of leading figures of the realm witnessed legal and financial transactions between the king's Treasurer and the sheriffs who governed the provinces [T]he Exchequer established common knowledge among the agents of the king about any question of whether a provincial sheriff might deserve punishment. Common knowledge and the constitutional commitment by the king to punish only those agents whose malfeasance was publicly verified helped to assure appropriate incentives for the king's principal agents and thus made government more effective.

Id. Note that the knowledge here is “common” only to those who directly participate in observing the transactions; other agents have to take the word of those on the panel that they observed no corruption and—importantly—that the panel members have the same definition of corruption as the other agents. Given the king's power to select panel members, the other agents might have reason to question the reports they receive from the panel.

¹⁹¹ See, e.g., U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

¹⁹² Consider, for example, the difficulty of coordinating rebellion on the basis of a constitutional breach when the breach is said—by some—to consist of false charges of corruption. Whether the allegedly corrupt actions actually occurred and, perhaps more important, whether actions that all agreed occurred were truly corrupt will often be subject to reasonable contestation. The “knowledge” that the government has violated the constitution by bringing false charges will not be “common,” thereby weakening the force of Weingast's argument.

¹⁹³ See Mauzy, *supra* note 14, at 55–56 (using the absence of such examples to show that Singapore's government is not a fully authoritarian regime).

word “patently” does a great deal of work here: typically the leader will offer reasons, from within the complex rule system, that—if accepted—would justify the imprisonment, removing it from the “patently arbitrary” category. Put another way, some violations might be treated as unambiguous, but only at the cost of arbitrariness on the subjects’ part. That is, treating such an action as a violation requires that subjects ignore reasoned arguments that the action is consistent with the constitution as embodied in a relatively thick set of rules in place.

The examples I have given of “good government” justifications for various developments in Singaporean law such as the creation of GRCs and the stringent libel laws illustrate how legal arguments can obfuscate what otherwise might be generally understood as “violations.”¹⁹⁴ Perhaps the departure from tradition will trigger inquiry into whether the change signals the possibility of other, more bothersome changes, or put another way, triggers an inquiry into whether a “violation” has occurred or is likely to occur. And, perhaps the regime will find the costs of responding to such an inquiry too great to bear. Yet, the costs are simply the costs of making reason-based arguments, which do not seem to me likely to be high. Of course critics will treat the good-government justifications as pretexts for what are actually moves toward authoritarianism, perhaps with a tinge of admiration for “[a]rtful or skillful manipulation.”¹⁹⁵ Not all potential regime opponents will be that cynical (or sophisticated), and the good-government justifications might be sufficient to shift an action from the “violation” category into the “development of the law consistent with constitutionalism” category.

Consider in this connection two examples. (1) The Law Society of Singapore tried to treat the abolition of criminal juries as a departure from inherited traditions that signaled a broader movement toward authoritarianism.¹⁹⁶ But, the change was not understood as a “violation” in Weingast’s sense because the abolition of jury trials could reasonably be portrayed as promoting efficient law enforcement and as resembling developments elsewhere.

(2) Even where constitutional provisions are clear and are clearly aimed at obstructing the development of authoritarian rule, eliminating such restrictions might not qualify as a violation either. Experience with constitutionally entrenched term limits for presidents shows that lengthening or eliminating such limits by constitutionally author-

¹⁹⁴ See *infra* text accompanying notes 353–56 see also *supra* text accompanying notes 45–53.

¹⁹⁵ Mauzy, *supra* note 14, at 58.

¹⁹⁶ See Carl A. Trocki, *David Marshall and the Struggle for Civil Rights in Singapore*, in *PATHS NOT TAKEN*, *supra* note 64, at 116, 122–23.

ized means may not readily be treated, at least widely enough, as a violation.¹⁹⁷ The reason is that the changes are made in apparent compliance with the constitution, not against it—even though the changes might be “anticonstitutional” in some sense.

Still another related argument is this: the leader provides enough benefits to a key segment of the potential opposition coalition to “buy off” opposition and thereby protect her position.¹⁹⁸ Put another way, there is an “authoritarian coalition” coordinated by the authoritarian party and containing key groups such as the business community or the military or labor unions. Any group with enough independent power to threaten the authoritarian party is paid off to stay within the coalition, while those without such power are kept out.¹⁹⁹ The success of this “divide and rule” strategy requires, first, that the leader have enough resources to buy off the key segment of the potential opposition,²⁰⁰ and, more important for my purposes, that the key segments believe—probably erroneously—that the leader cannot identify in sequence one, then another, key segment to buy off. If members in the key segment understand the possibility of a sequential divide-and-rule strategy, the strategy will unravel for reasons outlined above.

With this general background, I turn now to a more detailed examination of the instrumental uses in authoritarian regimes of courts and other institutional features associated with constitutionalism.

C. Courts in Authoritarian Nations

Functional or instrumentalist or strategic accounts of law, courts, and constitutions are subject to important instabilities, which are especially acute in connection with authoritarian regimes.²⁰¹ The general point, already made, is simple: such a regime will use law, courts, and constitutions to achieve these goals only so long as doing so serves the regime’s interests.²⁰² And, because the regime is authoritarian, it faces no constraints on abandoning law, courts, and constitutionalism when doing so would serve the regime’s interests—or, perhaps more

¹⁹⁷ See *infra* Part III.C.1(b) (discussing the restructuring of Venezuela’s constitution in an authoritarian direction by means of mechanisms said to be authorized by the constitution).

¹⁹⁸ This model is developed in HABER, RAZO & MAURER, *supra* note 177, at 343.

¹⁹⁹ See *id.*

²⁰⁰ The common observation that the PAP’s success in Singapore depends on achieving and sustaining a high level of material prosperity might be taken to support the view that the PAP is pursuing this strategy, and must do so.

²⁰¹ See, e.g., Moustafa & Ginsburg, *supra* note 163, at 5 (discussing how in authoritarian regimes, “judicial autonomy [may be] reduced significantly, but courts [may be] used extensively to sideline opponents”); Ginsburg & Simpser, *supra* note 161, at 7 (noting that authoritarian constitutions can be mere “window dressing” to placate the international community).

²⁰² See *supra* text accompanying notes 182–83.

interestingly, when law, courts, and constitutionalism appear to be interfering with the regime's (other) goals.

One difficulty with the various strategic accounts of constitutions and judicial review in authoritarian nations is that they generally do not take the characteristics of authoritarianism fully into account.²⁰³ They describe constitutions as credible commitments by the authoritarian rulers and judicial review as a mechanism by which some elements of the ruling coalition can monitor the activities of others, typically the chief executive's activities.²⁰⁴ But, it is puzzling how the commitments can be credible for more than a short period. The authoritarian leader—or, more generally, the dominant party in a dominant-party state—can modify the constitution at will, restrict the jurisdiction of the courts, or even replace the sitting judges.²⁰⁵ As noted above, strategic accounts ignore the possibility that the authoritarian ruler will be able to amend the constitution pursuant to its own terms, or will have enough power to ignore the constitution's amendment processes and change it extralegally.²⁰⁶

1. *Strategic Accounts of Constitutionalism in Authoritarian Societies and the Question of Abusive Constitutionalism*

Recent examples of what David Landau calls “abusive constitutionalism” illustrate the possibility that political leaders with large majorities will modify their nation's constitutions to entrench themselves permanently.²⁰⁷ That possibility shows why strategic or instrumental accounts of constitutionalism in authoritarian regimes cannot tell the whole story.²⁰⁸

²⁰³ See *supra* note 183 and accompanying text.

²⁰⁴ See, e.g., HOLMES, *supra* note 160, at 106, 109 (explaining Bodin's view that a ruler may be “bound fast by the constitutional rules of the kingdom” because “[b]y closing off some options, a ruler can open up others”); Moustafa & Ginsburg, *supra* note 163, at 7 (noting that authoritarian regimes empower courts in order to “discipline administrative agents of the state”).

²⁰⁵ Cf. Matthew C. Stephenson, “When the Devil Turns . . .”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 61 (2003) (arguing that party competition is required for the existence of stable forms of judicial independence).

²⁰⁶ There may be an emerging norm of international law that nations are obligated to follow their own constitutions. See generally Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149, 159–65 (2013), for a presentation of material suggesting this possibility. An authoritarian ruler that chose the second path to constitutional change would have to take the possibility of international condemnation and possible sanctions into account in doing so. See *id.*

²⁰⁷ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191 (2013).

²⁰⁸ One might include “abusive constitutionalism” as a separate category in a pluralized account of constitutionalism because it occurs when autocratic political leaders comply with the constitution's express terms. I have not done so here mainly for expository reasons. See *id.* at 211–16 (explaining how “informal norms” permit authoritarian regimes to create the appearance of democracy while still maintaining their power).

Abusive constitutionalism has several features. First, it involves the use of constitutionally permissible methods to modify an existing constitution.²⁰⁹ Second, it involves the adoption of numerous amendments to the existing constitution. Third, taken individually, the amendments may not be inconsistent with normative constitutionalism.²¹⁰ But, finally, considered as a package, the amendments threaten normative constitutionalism.²¹¹

a. *Hungary*

Hungary's post-communist government operated under a constitution adopted in 1949 but amended substantially in 1989–1990 and 1995.²¹² To ensure that the one-house parliament would support a stable government, the amended constitution gave bonus seats to larger parties, thereby reducing the probability that a winning party would have to form a potentially unstable coalition with smaller parties.²¹³ In addition, the constitution had a simple amendment rule—two-thirds of a single parliament could amend any provision of the constitution, although a four-fifths majority was required to “set the rules for writing a new constitution.”²¹⁴

In April 2010, the conservative party Fidesz, led by Viktor Orbán, won parliamentary elections with 53% of the popular vote.²¹⁵ The “bonus[]” system gave them 68% of the seats in parliament.²¹⁶ Fidesz used its supermajority to amend the constitution quite substantially. The provision requiring a four-fifths majority to rewrite the constitution was an “ordinary” provision, amendable by the ordinary two-

²⁰⁹ The phrase “constitutionally permissible” conceals a small problem. Sometimes abusive constitutionalism employs the mechanisms for amendment embodied in the existing constitution. Sometimes it deploys the constituent power directly but in a nonviolent way. See *id.* at 239–45 (describing how authoritarian regimes exploit the distinction between constitutional “replacement” and “amendment”).

²¹⁰ For example, an amendment that expressly deprived a despised minority of its right to vote would not be an example of abusive constitutionalism as I define it.

²¹¹ This is so for at least two reasons. (1) The new provisions give the political party introducing them an immediate political advantage, given the existing political context, even though one or another might be a simple “good government” reform in other political circumstances. (2) Inserting a single amendment into a constitution occurs without creating troubling or destabilizing interactions with other provisions, whereas introducing numerous amendments might create such interactions. See, e.g., *id.* at 200–03 (detailing the controversy surrounding former Colombian president Alvaro Uribe Velez’s attempt to extend his term by amending the constitution).

²¹² My account draws heavily on Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Disabling the Constitution*, 23 J. DEMOCRACY 138 (2012). András Jakab & Pál Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, 9 EUR. CONST. L. REV. 102 (2013), provide an account that gives more detail about the constitutional revisions and offer a more tempered account of the revisions’ political implications.

²¹³ See Bánkuti, Halmai & Scheppele, *supra* note 212, at 138.

²¹⁴ *Id.* at 139.

²¹⁵ *Id.* at 138.

²¹⁶ *Id.* at 139.

thirds majority.²¹⁷ The Fidesz parliament amended the four-fifths provision to authorize rewriting the constitution according to rules set by a two-thirds majority.²¹⁸ It changed the method for selecting judges on the constitutional court from one that required cross-party agreement on judicial nominations to one allowing two-thirds of the parliament to nominate and appoint judges, and then restricted the constitutional court's jurisdiction over fiscal matters and questions about the allocation of authority between the executive and parliament, although it preserved the court's jurisdiction over many individual-rights claims.²¹⁹ The parliament expanded the constitutional court's membership, which had the effect of allowing Fidesz to name a majority of the court's members.²²⁰ In addition, the parliament restructured the institutions charged with regulating elections and the media.²²¹ By altering the membership rules of the electoral commission, the Fidesz parliament was able to gain control of the commission.²²² It gave the media council, staffed by Fidesz members, expanded regulatory powers over the press media, though not the internet and social media.²²³ Finally, the parliament extended the terms of office of some of the occupants of "watchdog" positions to last beyond the next scheduled election and filled those offices with Fidesz members.²²⁴ These included the national audit office, the public prosecutor, and the office charged with regulating the ordinary courts and supervising judicial nominations for those courts.²²⁵

These constitutional changes altered the form of Hungary's constitutionalism from standard liberal constitutionalism to something with the potential for becoming authoritarian constitutionalism and,

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 140–43.

²²⁰ *Id.* at 140.

²²¹ *Id.* at 141.

²²² *Id.*

²²³ The constitutional court held that the expanded powers could not be used in connection with traditional print media. *Id.* at 141.

²²⁴ *Id.*

²²⁵ *Id.* at 144. The government "walked back" some of the initial amendments. For example, it rescinded an amendment that would allow the term of the head of the national judicial office to be extended beyond its scheduled expiration if parliament was unable to agree on a replacement by a two-thirds majority. The initial amendment, Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, was amended in July 2012 to establish a "line of succession" if the position of head of the national judicial office became vacant as the result of the expiration of the head's term. *Id.* at 143 (citing Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Opinion on Act CLXII of 2011 on the Legal Status and Enumeration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, 90th Plenary Sess., Doc. No. CDL-AD(2012)01 (Mar. 19, 2012), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e)).

beyond that, pure authoritarianism. As Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele put it:

Assuming that there continue to be free and fair elections among competing parties in the future, it will be hard for any other party to come to power with this level of political control over all the institutions necessary for democratic elections. Even if another party defies the odds and manages to win an election, however, Fidesz loyalists are entrenched in every corner of the state These loyalists ensure that there will be multiple choke-points at which Fidesz can stop anything that deviates from its preferences.²²⁶

Importantly for present purposes, all of these changes occurred within the existing constitutional framework: Fidesz and its leaders followed all the rules set out in the preexisting constitution and were able to plant the seeds of authoritarian constitutionalism.²²⁷

b. *Venezuela*

Hugo Chávez was elected president of Venezuela in 1999.²²⁸ Over the next decade, he transformed a competitive democratic system into something else—perhaps not an authoritarian constitutionalist one, but certainly a hybrid one.²²⁹ Shortly after taking office, Chávez set in motion a procedure for constitutional amendment by setting up a “consultative referendum” that would elect delegates to a constituent assembly.²³⁰ The Venezuelan constitution authorized the nation’s legislature to amend the constitution or to call a constituent assembly by a two-thirds vote.²³¹ A year before Chávez’s election, though, his predecessor had used a consultative referendum, so Chávez’s action had some precedent. The legislature challenged Chávez’s plan, but in 1999 the Venezuelan Supreme Court held that the referendum process did not violate the constitution, invoking the idea that the nation’s people, acting as the constituent power, could not be constrained by preexisting law about the processes for constitutional revision.²³² Held in April 1999, the referendum resulted in an 87%

²²⁶ Bánkuti, Halmai & Scheppele, *supra* note 212, at 145.

²²⁷ For developments in 2013, see Gábor Halmai, *The End of Liberal Constitutionalism in Hungary?*, INT’L J. CONST. L. BLOG (Apr. 17, 2013), <http://www.icconnectblog.com/2013/04/the-end-of-liberal-constitutionalism-in-hungary>.

²²⁸ See JAVIER CORRALES & MICHAEL PENFOLD, *DRAGON IN THE TROPICS: HUGO CHÁVEZ AND THE POLITICAL ECONOMY OF REVOLUTION IN VENEZUELA* 1 (2011).

²²⁹ The term “hybrid” comes from *id.* at 1.

²³⁰ *Id.* at 17.

²³¹ *Id.*

²³² *Id.* For a detailed discussion of the legal issues, see ALLAN R. BREWER-CARÍAS, *DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT* 52–53 (2010). Brewer-Carías does not discuss his role, the precise contours of which are contested, in an abortive coup against Chávez in 2002. See also Landau, *supra* note 207, at 204 (discussing Chávez’s consolidation of power through constitutional modification and the subsequent spread of that tactic to other Latin American countries). The theoretical issues

vote in favor of convening a constituent assembly.²³³ Again with the approval of the Supreme Court, ordinary legislative sessions were suspended while the constituent assembly met. The election rules for the constituent assembly favored the well-organized Chavista party over opposition parties, which put up multiple candidates in each constituency. As a result, Chávez's party held 94% of the seats in the constituent assembly despite having won only 53% of the votes.²³⁴ The constitution drafted in 1999 substantially expanded presidential power. The president's term was lengthened by one year, reelection to a second term was allowed, and the legislature's upper house was abolished.²³⁵ Importantly, transitional provisions gave substantial authority to a council dominated by members of the constituent assembly and other *chavistas*. Using that authority, the transitional council appointed new members to the election-monitoring body.²³⁶

New elections were held in 2000. Chávez's coalition won 60% of the seats in the now single-house legislature.²³⁷ The opposition mobilized substantial demonstrations, and attempted a coup, which failed after a few days.²³⁸ The opposition turned to strikes and similar mobilizations of civil society. Chávez responded by nationalizing the petroleum industry, which had been a major site of opposition.²³⁹ The opposition attempted to recall Chávez. The election-monitoring board, which *chavistas* controlled because of the transitional laws, enforced rules that made it difficult to invoke the constitution's recall provisions, but eventually, the monitoring board agreed that the recall petition had enough signatures.²⁴⁰ The recall election was scheduled for August 2004. Chávez met the threat by a massive increase in public spending—from oil revenues—distributed to the nation's poor.²⁴¹ Chávez defeated the recall, winning 59% of the vote.²⁴² The opposi-

associated with the idea of the constituent power are quite complex, and exploring them would take this discussion too far afield. For some brief reflections, see Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983, 1984–93 (2013).

²³³ See BREWER-CARÍAS, *supra* note 232, at 55.

²³⁴ See *id.* at 56.

²³⁵ See *id.* at 73–74.

²³⁶ See *id.* at 75–76.

²³⁷ CORRALES & PENFOLD, *supra* note 228, at 20.

²³⁸ *Id.* at 21–22. Corrales and Penfold refer to these events as a “series of coups . . . (Chávez's coup against institutions of checks and balances, the military coup against Chávez, Carmona's coup against the constitution and elected officials, and the civil-military coup against Carmona).” *Id.* at 22. But I think it important that Chávez's actions, while perhaps an example of abusive constitutionalism, were consistent with the constitutions in place at the time. Notably, his initial moves were approved by a supreme court whose members predated Chávez's accession to the presidency. See *supra* text accompanying note 232.

²³⁹ See BREWER-CARÍAS, *supra* note 232, at 250–51.

²⁴⁰ See *id.* at 383–84.

²⁴¹ See CORRALES & PENFOLD, *supra* note 228, at 26.

²⁴² See *id.*

tion, disheartened, “simply collapsed.”²⁴³ Chávez’s opponents, identified through a computerized list, found themselves shut out of jobs, public contracts, and other “social benefits.”²⁴⁴ Legislative elections were held in December 2005.²⁴⁵ The opposition boycotted the elections, so *chavistas* took complete control over the legislative process.²⁴⁶

The next presidential election took place in 2006.²⁴⁷ The opposition objected to various features of the election rules, and the government responded with what two analysts critical of Chávez call “partial reforms,” including election monitoring.²⁴⁸ Javier Corrales and Michael Penfold note that the election monitors did not find “evidence of rigged voter registration, but they did confirm that the system did not fully protect against voting by unregistered voters.”²⁴⁹ They note as well that the government removed fingerprint machines from some polling places but kept them in poorer communities, where Chávez’s support was highest.²⁵⁰ According to Corrales and Penfold, “The opposition claimed that by keeping fingerprint machines in these key polls, the government was deviously playing a ‘psychological’ game: encouraging people to question the secrecy of the vote, which would boost abstention rates among opposition voters.”²⁵¹ Chávez won the election, which the opposition conceded to be basically free of fraud, with 63% of the vote, “the widest margin and highest voter turnout in Venezuelan history.”²⁵² Having achieved power, Chávez consolidated it through a number of statutes and decrees that further centralized power in the presidency. But, notably, Chávez’s call for constitutional amendments further enhancing presidential power, including an elimination of term limits, failed in a referendum held in December 2007.²⁵³ Persistent, Chávez held another referendum in February 2009, confined to the term-limits issue.²⁵⁴ The amendment was approved by 55%.²⁵⁵

The Venezuelan case resembles the Hungarian one: authoritarian rules were put in place through methods that complied with the existing, liberal constitution. Corrales and Penfold call some of Chávez’s early actions a “coup,” but the term is merely metaphori-

²⁴³ *Id.* at 27.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 28.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 30.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 30, 36.

²⁵¹ *Id.* at 30–31.

²⁵² *Id.* at 32.

²⁵³ *See id.* at 37.

²⁵⁴ *See id.* at 38.

²⁵⁵ *See id.*

cal.²⁵⁶ The actions they describe may have been anticonstitutional in intent and in the goals they sought, but they were all consistent with the constitution in place.

c. *Conclusion*

The examples of abusive constitutionalism in Hungary and Venezuela are somewhat different from authoritarian constitutionalism as practiced in Singapore. The PAP *could* disable the opposition by grossly manipulating constitutional rules but has not done so with nearly the vigor we can see in Hungary and Venezuela. I speculate that the difference is that the political leaders in Hungary and Venezuela were not committed to the idea of constitutionalism as a constraint on power and so were willing to use constitutional forms to achieve anticonstitutional goals, whereas the PAP's leadership is committed to a recognizable form of constitutionalism. If so, the normative commitment to constraints on public power, which I extracted from my description of how constitutionalism operates in Singapore, might be a truly distinguishing characteristic of authoritarian constitutionalism.

2. *The "Dual State"*

A more general account of instrumental uses of constitutional forms comes in the suggestion that courts in authoritarian systems can be an important component in what Ernst Fraenkel called a "dual state."²⁵⁷ As the term suggests, dual states have two components. In one, democracy reigns and independent courts administer law just as they do in liberal democracies. In the other, arbitrary rule prevails. Fraenkel used the example of Nazi Germany, and Jens Meierhenrich applied the concept to apartheid South Africa. The key to maintaining a dual state is defining the line that divides its two components. Nazi Germany and apartheid South Africa did so on the basis of ascriptive characteristics (religion and race, respectively), a definition that might seem easy to administer.²⁵⁸ But, nothing in the concept of the dual state requires that the defining characteristic be ascriptive.

²⁵⁶ See *id.* at 22.

²⁵⁷ See generally ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941). For an extensive discussion of Fraenkel's analysis and an application to apartheid South Africa, see JENS MEIERHENRICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652–2000*, at 62–79 (2008). For a briefer, more general description of "dual state" ideas, see Guarnieri, *supra* note 140, at 238–41.

²⁵⁸ See PIERRE L. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 18 (1981) (using the useful term "*Herrenvolk* democracies" to describe "regimes . . . that are democratic for the master race but tyrannical for the subordinate groups").

So, for example, Fraenkel argued that the “arbitrary” state in Nazi Germany administered law on matters that were politically sensitive.²⁵⁹

Commentators on Singapore’s political development have invoked ideas that resemble the dual-state concept. They have argued that the Singaporean government offered the rule of law to foreign investors, for example, while maintaining a system of relatively arbitrary rule domestically.²⁶⁰ In the early 2000s, Singapore’s political leadership began to focus on attracting the “creative” class to the city-state, a cosmopolitan group that would drive innovation forward but the members of which wanted relatively high degrees of freedom for themselves.²⁶¹ Again, a dual state—civil liberties for the cosmopolitans, arbitrary rule for the rest—might seem workable.²⁶²

What we might call the Niemöller problem poses the primary difficulty for maintaining a dual state.²⁶³ The line dividing the nonarbitrary state from the arbitrary one has to be drawn by the very people who administer both the arbitrary and the nonarbitrary state, and they can provide no guarantees that in doing so they will act pursuant to the rule of law rather than arbitrarily.²⁶⁴ As a result, people whose

²⁵⁹ See FRAENKEL, *supra* note 257, at 62.

²⁶⁰ See, e.g., Sim, *supra* note 43, at 321–22 (referring expressly to the dual-state idea and asserting in connection with Singapore, “[t]he law is . . . bifurcated, insofar as commercial law remains depoliticized and paramount to encourage investment, facilitated through strong legal institutions, yet there is no expansion of rights in the public sphere” (citation omitted)); Thio, *supra* note 31, at 7 (“[A] dichotomous or ‘schizophrenic’ approach towards the role of law and legal institutions appears to be maintained between commercial law matters and issues relating to social justice, civil society, and individual rights.”).

²⁶¹ See Kenneth Paul Tan, *Censorship in Whose Name?*, in *RENAISSANCE SINGAPORE?*, *supra* note 70, at 76 (observing that Singapore’s “new econom[y]” is based on creativity).

²⁶² The “cosmopolitan” version of the dual state faces a special problem: cosmopolitans might value not merely their own freedom but the freedom of those in the nation where they are located. One might develop a suggestive but controversial contrast between the interest of cosmopolitans in sexual freedom, which might perhaps be satisfied by ensuring that cosmopolitans but no one else have sexual freedom, with their interest in freedom of expression, which they might wish extended to all. (The point of the example is not to identify actual interests of cosmopolitans but to indicate a theoretical possibility; the reverse might be true as well—cosmopolitans interested in sexual freedom for all, but interested in freedom of expression only for themselves.) The dual state might be maintained even with respect to freedom of expression if the state is able somehow to keep the cosmopolitans ignorant of the conditions elsewhere in the nation. For a brief discussion of these points, see Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985, 997–98 (2009).

²⁶³ I refer here to the famous statement by Pastor Martin Niemöller, which exists in various versions: “First they came for the communists, and I did not speak out—because I was not a communist . . . Then they came for me—and there was no one left to speak out for me.” Harold Marcuse, *Martin Niemöller’s Famous Quotation: “First They Came for the Communists . . .”*, U.C. SANTA BARBARA (Sept. 12, 2000), <http://www.history.ucsb.edu/faculty/marcuse/niem.htm#top> (discussing statement’s history); see also Frank Dunham, *Where Hamdi Meets Moussaoui in the War on Terror*, 53 DRAKE L. REV. 839, 839 n.3 (“This quote is most often attributed to Niemöller, but its exact source and wording is varied.”).

²⁶⁴ As the core examples of Nazi Germany and apartheid South Africa indicate, even lines drawn on the basis of ascriptive characteristics can move arbitrarily, as shown by the

actions are *currently* allocated to the regular or independent judicial system should not be confident that when the time comes to appear before a court, they will in fact be brought into that system.²⁶⁵ And, once again reasoning backward, people should generally assume that their actions might come within the jurisdiction of the political system. The regime then loses the strategic benefits it sought from the dual state.

3. *Courts in Authoritarian Nations: Conclusion*

I have examined several versions of strategic or instrumental accounts of courts and constitutionalism in authoritarian regimes. With respect to each version, I have argued that it is hard to understand how commitments to constitutionalism could be credible in the strategic sense. It is worth emphasizing, though, that authoritarian rulers might actually have “steady” desires, such as a desire for national glory or national economic development, and those desires might produce some forms of constitutionalism. Yet, if we expand the range of rulers’ preferences from mere perpetuation in power to more substantive desires, there is no obvious reason to rule out the possibility that one such desire might be for constitutionalism as such.

D. Other Benefits of Constitutionalism to Authoritarian Rulers

Authoritarian leaders can use other features of constitutionalism instrumentally. Elections and freedom of expression can reveal information about popular discontent with regime policies and, especially, their implementation. As long as that information does not show such deep levels of discontent as to threaten the regime’s stability, the leaders can use the information to modify policies that are not central to the regime and, again especially, to monitor the performance of the personnel charged with implementing policy. Elections can also serve as a co-optation device, channeling potential regime-threatening opposition onto less threatening paths.²⁶⁶

Nuremberg laws defining the category “Jew” and the existence of the category “coloured,” respectively.

²⁶⁵ Cf. FRANK ET AL., *supra* note 55, at 98–99 (“[T]he [Singapore] government’s willingness to compromise the independence of judges and lawyers cannot be limited to political cases. A judiciary which by its very structure lacks requisite independence from the government . . . retain[s] these characteristics in all cases involving the government or the governing party, not simply in political cases.”).

²⁶⁶ For an overview of the functions elections serve for authoritarian rulers, see Jennifer Gandhi & Ellen Lust-Okar, *Elections Under Authoritarianism*, 12 ANN. REV. POL. SCI. 403, 404–06 (2009).

1. *Elections and Freedom of Expression as Information-Revealing Devices, and Some Alternatives*

The PAP's reaction to the results of the 2011 elections shows how authoritarian leaders treat elections as mechanisms for providing them with information. They took the results as a signal that something had gone wrong with their policies²⁶⁷ and pledged to adjust—although precisely what had gone wrong, and what adjustments were foreseen, remained unclear.

Elections have their limits as information-revealing devices. They often provide relatively crude indications of popular discontent. The PAP's leaders could take their electoral "defeat" as an indication that they had been doing something wrong, but the results alone could not tell them exactly what that was. Opposition party platforms, and even campaign strategies, may be so comprehensive that drawing specific inferences from popular support of those platforms and strategies would be hazardous.

Perhaps more important, elections are self-limiting as information-revealing devices in authoritarian regimes. Opposition parties that move outside the range of criticism the regime finds tolerable—that argue for the complete replacement of the regime, for example, or that stress the deep corruption of the regime's leaders—may find themselves facing severe repression. Anticipating that possibility, opposition leaders will pull their punches, taking care not to exceed the limits of criticism the regime will tolerate. When they do so, though, they inevitably deny the regime some information about failures of policy and implementation that are *not* regime threatening.²⁶⁸

Authoritarian regimes can use techniques other than reasonably free and fair elections to obtain information about popular views of policy and its implementation. In Russia, for example, the regime has created complaint bureaus—"public reception offices"—that receive complaints on those issues.²⁶⁹ The bureaus are located outside the ordinary administrative hierarchy, because leaders understand that

²⁶⁷ See Adam, *supra* note 1.

²⁶⁸ Cf. Edmund Malesky, Paul Schuler & Anh Tran, *The Adverse Effects of Sunshine: A Field Experiment on Legislative Transparency in an Authoritarian Assembly*, 106 AM. POL. SCI. REV. 762, 776–84 (2012) (reporting that an experiment making more transparent the actions taken by legislators in Vietnam's national assembly reduced the legislators' level of activity and arguing that it did so because transparency reduced the legislators' willingness to bring to the attention of the regime's leaders information that might destabilize the regime).

²⁶⁹ For a description of the complaint bureaus, see WILLIAM J. DOBSON, *THE DICTATOR'S LEARNING CURVE: INSIDE THE GLOBAL BATTLE FOR DEMOCRACY* 22–23 (2012) (observing that the complaint bureaus "provide a direct line of communication for citizens to air their problems, grievances, and complaints to the central government"); see also *id.* at 23–24 (describing the Russian "Public Chamber," with a similar function); Carl F. Minzner,

personnel on the ground may be reluctant to report adverse information about popular views on regime policies and will surely be reluctant to report to their superiors their own deficiencies as implementers of policy.²⁷⁰ The complaint bureaus, like ombud offices in liberal democracies, bypass line officials to channel information from lower levels to central administrators.²⁷¹ From an instrumental point of view, the choice between these techniques and reasonably free and fair elections should be determined by the comparative costs of each. And, because holding reasonably free and fair elections poses some risks to the regime, I suspect that the alternative techniques are generally likely to be less costly than holding such elections.

Scholars have suggested that courts can serve similar information-revealing functions, especially in connection with policy implementation. As Carlo Guarnieri puts it, "national rulers are willing to employ courts as a check on local political bosses; the central government will try to establish some channels of influence with lower court judges, but it will allow some degree of independence of courts from local politics."²⁷² Authoritarian regimes, though, must then worry about the possibility that the lower-level bureaucrats and the local courts might corrupt each other through what some scholars of Communist China call local protectionism.²⁷³ The remedies are some form of centralization—divorcing the local judicial budget from local revenue sources,²⁷⁴ for example, or creating a readily available mechanism of appeal to some regional or central body.

Guaranteeing some degree of freedom of expression clearly has similar information-revealing characteristics. Here the only point worth making is that such guarantees are necessarily self-limiting in an

Xinjiang: An Alternative to Formal Chinese Legal Institutions, 42 STAN. J. INT'L L. 103, 105–07 (2006) (describing similar institutions in the People's Republic of China).

²⁷⁰ See DOBSON, *supra* note 269, at 24 (noting that "the need for reliable, independent information is so great [that United Russia] doesn't even trust that its own members will give it the unvarnished truth").

²⁷¹ See LYDGATE, *supra* note 36, at 96–97 (describing citizens' consultative committees and residents' committee in Singapore that serve as complaint bureaus).

²⁷² Guarnieri, *supra* note 140, at 240; see also Tom Ginsburg, *Judicial Independence in East Asia: Lessons for China*, in JUDICIAL INDEPENDENCE IN CHINA, *supra* note 140, at 249 ("A limited regime of administrative complaints by the public can shine the light on bureaucratic malfeasance, informing the regime center and improving the quality of government."); cf. Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA, *supra* note 140, at 81–82 (describing practices in China that involve directives from central Communist Party institutions seeking reports from local courts on individual cases).

²⁷³ See Peerenboom, *supra* note 272, at 82–83; Xingzhong, *supra* note 174, at 90–91 (discussing local protectionism).

²⁷⁴ See Peerenboom, *supra* note 272, at 83 (observing that the regime in China "opted for both approaches, . . . recommending that the central and provincial level be responsible for funding the courts").

authoritarian regime. As with opposition parties, ordinary citizens will know that the regime sets limits on what sorts of expression it will tolerate, and citizens will therefore steer wide of the “unlawful” zone²⁷⁵—and thereby will provide the regime less information than it actually would find useful. As William Alford observes about “rice-roots legal workers” in China, who provide legal services in rural areas, “The very qualities . . . that are a part of the allure of rice-roots legal workers for rural Chinese also potentially represent an important impediment to these workers serving the same clientele as effectively as they might, lest in vigorously challenging officialdom, rice-roots legal workers jeopardize their own long-term relationship with the powerful.”²⁷⁶ This self-limiting dynamic applies far more generally.

Some of the arguments about elections and free expression as information-revealing devices rely rather heavily on the difficulties officials at the center—the regime’s leaders—face in acquiring accurate information about policy and its implementation on the periphery. These are clearly difficulties of scale, and it may therefore be worth noting that they might not arise in a city-state like Singapore, where the distinction between center and periphery is almost vanishingly thin. The PAP’s leaders can and do visit the city’s neighborhoods without any logistical difficulties, and they can receive complaints about neighborhood problems directly.²⁷⁷ This suggests that Singapore’s commitment to reasonably free and fair elections, which I include as part of its authoritarian constitutionalism, rests on something other than elections’ utility as an information-revealing technique.

2. *Elections as Co-optation*

Authoritarian regimes are sometimes said to use elections as devices to co-opt or domesticate opposition. One aspect of co-optation is that the regime provides outlets for oppositionist impulses to let off steam without affecting policy by tolerating opposition parties that are consigned to ineffectiveness. Here, the puzzle is explaining why the opposition leaders allow themselves to be bought off in this way.²⁷⁸

²⁷⁵ I take the phrase from *Speiser v. Randall*, 357 U.S. 513, 526 (1958), and the U.S. law of overbreadth. For further discussion on overbreadth, see Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 854 (1991).

²⁷⁶ William P. Alford, “*Second Lawyers, First Principles*”: *Lawyers, Rice-roots Legal Workers, and the Battle over Legal Professionalism in China*, in PROSPECTS FOR THE PROFESSIONS IN CHINA, *supra* note 174, at 62.

²⁷⁷ See, e.g., Lee Hsien Loong, *PM Lee’s Visit to Queenstown*, PAP60 (Mar. 25, 2013), available at <http://www.pap.org.sg/ground/grassroots-activities/pm-lee-visits-queenstown> (reporting on Prime Minister Lee Hsien Loong’s visit to the satellite town Queenstown).

²⁷⁸ Cf. Ellen Lust-Okar, *Elections Under Authoritarianism: Preliminary Lessons from Jordan*, 13 DEMOCRATIZATION 456, 460 (2006) (“[T]he logic underlying . . . [arguments that ‘elections in authoritarian regimes add legitimacy to the regime’] is not convincing. It suggests that individuals are somehow led to believe . . . that their elections . . . give them greater

Another aspect is that “[e]lections allow leaders to identify the most popular local notables or potential opposition forces” and then “placate [them] by giving them some say over policymaking.”²⁷⁹ Co-optation is effective because it “takes place in a more stable, institutionalized environment than would be the case in an informal . . . arrangement,” and “disagreements . . . can be presented in a controlled and unthreatening manner that will not generate larger protests.”²⁸⁰ Yet, why the co-opted participants would indeed be placated is not entirely clear. Perhaps the regime throws them some scraps on minor policy issues, and the opposition leaders believe that something is better than the nothing the regime might do were they not to participate in elections with effectively predetermined outcomes.²⁸¹ Yet, a sophisticated regime could make the minor policy changes on its own, without using elections as a co-optation device, so it remains unclear why authoritarian regimes would use elections for these purposes.²⁸²

Again, other institutional mechanisms can substitute for elections as co-optation devices. The PAP leadership in Singapore institutionalized co-optation by creating positions for opposition party members and elites outside the PAP. The NCMP and NMP system places the holders of those positions on the border between co-optation by election and pure co-optation.²⁸³

input into decision-making than they do.”). I put aside the possibility of straightforward corruption: the regime gives opposition leaders material benefits for participating, thereby deterring them from engaging in more vigorous opposition efforts.

²⁷⁹ Malesky, Schuler & Tran, *supra* note 268, at 765.

²⁸⁰ *Id.* at 766.

²⁸¹ Leaders of Singapore’s main opposition party regularly complain about the limited role they have in Parliament, but, while expressing their discontent, have regularly accepted appointments as NCMPs. See S. Ramesh, *Three NCMP Candidates Formally Named*, TODAY (May 18, 2011), <http://archive.today/qnMn5>; Jeffrey Oon, *Trio of NCMPs Formally Announced*, YAHOO! NEWS (May 17, 2011), <http://sg.news.yahoo.com/blogs/singaporescene/trio-ncmps-formally-announced-022657457.html>.

²⁸² See Carles Boix & Milan Slovik, *Non-Tyrannical Autocracies* 13–14 (Apr. 2007) (unpublished manuscript) (on file with author) (arguing that the regime needs to identify the local notables because the latter have some degree of control over their locales and maintain it by delivering desired policies to those populations). Yet, the regime could alternatively deliver the policies directly to the population, thereby cutting out the middleman. It seems to me that this account would then become one in which elections serve as information-revealing devices.

²⁸³ As with reasonably free and fair elections as information-revealing devices, here too the choice of such elections or alternative methods of co-optation should, from an instrumental point of view, be determined by relative costs.

3. *Elections as Intimidation*

Elections can reveal information *about* the regime as well as provide information *to it*.²⁸⁴ A regime that wins a reasonably free and fair election by a wide margin can by that very fact discourage opposition. Opponents might think that a narrow margin of victory might have resulted from chance, or from having put up a slightly inferior candidate. But, they might worry, how much effort is it worth to try to shift the electoral margin from 80% against them to 65% against them?

Singapore's 2011 election suggests one difficulty with this strategy, from the authoritarian regime's point of view. Having set expectations for a huge margin of victory, 60% apparently seemed "narrow" to participants in Singapore's political circles.²⁸⁵ The alternative, of course, is to abandon the commitment to reasonably free and fair elections when electoral margins fall below some reasonably high level. At that point elections no longer intimidate the opposition, but forceful intimidation does. The fact that Singapore appears to be committed to continuing to conduct reasonably free and fair elections provides one reason for thinking that it offers an example of authoritarian constitutionalism rather than pure authoritarianism.

E. Two Qualifications

The argument to this point has been that strategic or instrumental accounts of courts and constitutionalism in authoritarian regimes generally fail because of the problem of unraveling. That problem might not arise in two circumstances: (1) transitional periods, and (2) when the experience of constitutionalism, initially adopted for strategic reasons, sets in train a dynamic process that escapes the regime's control.

1. *Transitional Periods*

The literature on courts and constitutions in authoritarian societies tends to focus on two time periods. First, it is argued, creating a constitution immediately after an authoritarian regime is established allows the new rulers to deprive their adversaries of any legal basis for asserting power and, more important, allows the new rulers to establish a framework allocating power among themselves.²⁸⁶

²⁸⁴ See ALBERTO SIMPSEY, WHY GOVERNMENTS AND PARTIES MANIPULATE ELECTIONS: THEORY, PRACTICE, AND IMPLICATIONS 152–60 (2013) (developing a more general version of this account, including manipulations that exceed the limits of reasonably free and fair elections).

²⁸⁵ In the 1990s, political lore in Singapore had it that an election in which the PAP received less than 80% of the vote would be a disaster for the party.

²⁸⁶ See, e.g., ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP 168 (2002) (discussing structure and content of the 1980 Chilean constitution); Albertus & Menaldo, *supra* note 157, at 282 (contending that imposing a constitution can help prolong an au-

The other period on which the literature focuses is the time when the authoritarian regime is, or is thought by some to be, in irreversible decline.²⁸⁷ During this period, strategic accounts of judicial review in particular are indeed persuasive. Judges in place, anticipating regime change, attempt to figure out what actions will maximize their chances of staying in office through and after the transition. Sometimes, perhaps often, those actions will lead the judges to take stands against the rulers in place, who, the judges think, may not be in place much longer.

Strategic accounts may have some purchase quite early in an authoritarian regime's history and more purchase when the regime has jumped the shark. What they do not provide, though, is an account of authoritarian constitutionalism in stable authoritarian regimes.²⁸⁸

2. *Dynamic Changes*

Authoritarian rulers might place constitutional constraints on themselves and create enforcement institutions for strategic reasons, believing that they can remove the constraints or restructure the institutions if their preferences change.²⁸⁹ But they might find that they have unleashed a dynamic in which the constraints and institutions interact in unexpected ways, pushing toward the creation of liberal democracy or a stabilized restructured regime of a sort that I describe

thoritarian's rule). I would think that the new constitutional framework would ratify the informal allocation of power within the new ruling group, and indeed sometimes the literature seems to me to blur the distinction between a written constitution and unwritten constitutions. Here the puzzle is then why the formal allocation of power might continue to have some constraining effect when the actual power relationships change. So, for example, consider a military junta in which the army, air force, and navy chiefs of staff take power and establish a constitution requiring the agreement of two of the three to adopt any policy. Suppose that, within a few years, it becomes apparent that the navy chief of staff simply lacks sufficient support from the relevant constituencies ("sailors," say) to have any real power. Why won't the army and air force chiefs amend the constitution to eliminate the navy from the junta? (One might think that the army's leaders would prefer to maintain the requirement of navy agreement, to preserve the possibility that they might form a coalition with the navy against the air force. Yet, doing so also preserves the possibility that the navy would form a coalition with the air force against the army. There may be conditions under which the latter risk is worth bearing, compared to the possibility of engaging in a direct power struggle with the air force, but I am skeptical about their actual existence.)

²⁸⁷ See, e.g., Moustafa & Ginsburg, *supra* note 163, at 21 (addressing the complexity of courts in an authoritarian state because they may both "maintain social control" and "open a space for activists to mobilize"); Charles Anthony Smith & Mark Jorgensen Farrales, *Court Reform in Transitional States: Chile and the Philippines*, 13 J. INT'L REL. & DEV. 163, 164 (2010) (listing several reasons why authoritarians develop independent judicial institutions).

²⁸⁸ In my view, the literature on stable authoritarian regimes locates a great deal of the stability in authoritarian repression, often violent, and fraudulent elections. (Or, at least, reverts to repression and electoral fraud as the ultimate foundation of authoritarian stability.) If there is such a thing as authoritarian constitutionalism, it is not going to have either of those features.

²⁸⁹ See *supra* text accompanying note 178.

as authoritarian constitutionalist.²⁹⁰ Bruce Rutherford sketches one possible sequence: the regime is weakened by some sort of exogenous crisis; “regime elites try to preserve their power . . . by adopting political, legal, and economic reforms” that “create opportunities for competing conceptions of the polity to emerge and grow”; “[i]nstitutions that espouse alternative conceptions . . . exploit these opportunities”; the regime “permits this process to proceed either because it is unable to stop it, or because the reforms it produces provide benefits to the regime”; and the result is a regime in which “multiple conceptions of the polity” offered by political entrepreneurs compete in a process of “cooperation, conflict, and innovation” that can preserve the (new) order’s stability.²⁹¹ The literature suggests, though without spelling out the mechanisms in detail, that this is especially likely where one of the institutional reforms involves the (initially limited) empowerment of civil society.²⁹² So, for example, perhaps the creation of constitutional courts brings into being a new constituency of activist lawyers who specialize in constitutional litigation. This new interest alters the internal dynamics of interest-group pressure and may be particularly effective in opposing withdrawal of jurisdiction from the constitutional courts. The empirical evidence for such a dynamic is, in my judgment, thin and speculatively based on pushing anecdotes to their limits.²⁹³

F. Conclusion

As noted in the Introduction, the preceding Part has been deflationary. I have argued that strategic or instrumental accounts of the adoption of constitutionalism in authoritarian regimes are generally flawed. That does not mean, of course, that all authoritarian regimes are constitutionalist. It does suggest, though, that if we observe persistent constitutionalist features in authoritarian regimes, we might conclude that those features serve the regime’s goals, but those goals might not be “merely” instrumental. Perhaps, for example, the au-

²⁹⁰ A.B. WHITE, *SELF-GOVERNMENT AT THE KING’S COMMAND: A STUDY IN THE BEGINNINGS OF ENGLISH DEMOCRACY* 2 (1933), describes how English kings used the people generally to monitor the behavior of local officials, with the result that the kings, having “so used the English people in government, [and having] laid upon them for centuries such burdens and responsibilities, . . . went far toward creating the Englishman’s governmental sense and competence.” For a discussion of the use of courts and other institutions in authoritarian societies to monitor official behavior, see *supra* text accompanying notes 267–74.

²⁹¹ BRUCE K. RUTHERFORD, *EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD* 27–28 (2008).

²⁹² For additional discussion, see *supra* Part III.D.1 (discussing the role of civil society in providing information to authoritarian rulers).

²⁹³ The primary anecdote involves the Lawyers’ Movement in Pakistan. For a discussion, see Shaoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan Under Musharraf*, 35 *LAW & SOC. INQUIRY* 985, 1002 (2010).

thoritarian ruler has a normative commitment to advancing the nation's honor and concludes that constitutionalism will help do so. Or, perhaps, these authoritarian rulers have a direct normative commitment to some degree of constitutionalism.²⁹⁴ In the latter case, authoritarian constitutionalism would then be part of the pluralized universe of constitutionalism.

IV

AUTHORITARIAN CONSTITUTIONALISM

How can authoritarian constitutionalism be distinguished from (mere) authoritarianism and rule-of-law constitutionalism? For present purposes, constitutionalism is normatively weighted and not necessarily applicable to all states that have written constitutions, even written constitutions setting out institutional arrangements and individual rights. The 1936 Constitution of the Soviet Union had such a constitution, but the Soviet Union was fully authoritarian.²⁹⁵ I take as a rough definition of authoritarianism that all decisions can potentially be made by a single decision maker,²⁹⁶ whose decisions are both formally and practically unregulated by law, though as students of authoritarian constitutions have emphasized, they might be regulated by conflicts of power,²⁹⁷ even rather structured and predictable conflicts.²⁹⁸ Constitutionalists differ on the content of normative constitutionalism, and I do not intend to take a position on anything other than what its broad boundaries are.

A. Some Characteristics

My discussion of the role of courts and constitutions in authoritarian regimes suggests some of the characteristics of authoritarian constitutional ones, which I sketch next.

²⁹⁴ Formally, the argument in the text is that we should take the rulers' utility functions to include both their own material well-being and something else, such as advancing national honor or respecting constitutionalism.

²⁹⁵ See William Mishler & Richard Rose, *Generation, Age, and Time: The Dynamics of Political Learning During Russia's Transformation*, 51 AM. J. POL. SCI. 822, 822 (2007).

²⁹⁶ Which might be a collective body, such as the Central Committee of the Chinese Communist Party. He and Warren use the term "command authoritarianism." He & Warren, *supra* note 12, at 273.

²⁹⁷ This definition implies that political constitutionalism, as discussed in the British literature, must describe politics as more than a mere power struggle, the precipitate of which yields normative constitutionalism, but as implicating in politics itself arguments about law. See, e.g., Allan, *supra* note 136, at 77–80.

²⁹⁸ It is probably worth noting that an authoritarian regime might *choose* to implement normative constitutionalism, on the condition that it remain free to replace it at any time. As one Chinese informant put it to me, "The People's Republic of China could have a real constitution whenever the Central Committee of the Communist Party wanted it—and for as long as the Central Committee wanted it." The regime would have to consider the possibility that doing so would unleash the dynamic process discussed in *supra* Part III.E.2.

(1) The regime, which for expository convenience I will assume is controlled by a dominant party, makes all relevant public policy decisions, and there is no basis in law for challenging whatever choices the regime makes. This is what makes the regime authoritarian.

(2) The regime does not arrest political opponents arbitrarily, although it may impose a variety of sanctions on them, such as the risk of bankruptcy from libel judgments in Singapore.²⁹⁹

(3) Even as it employs such sanctions, the regime allows reasonably open discussion and criticism of its policies. The regime's critics find themselves able to disseminate their criticisms even after they have been sanctioned. The Singaporean libel judgments impoverish the government's critics, but they still have access to resources through friends and family who are not themselves active critics of the government (and therefore cannot be sanctioned because of the limitations rule-of-law constitutionalism places on the regime).³⁰⁰

(4) The regime operates reasonably free and fair elections, with close attention to such matters as the drawing of election districts and the creation of party lists to ensure as best it can that it will prevail—and by a substantial margin—in such elections. Fraud and physical intimidation occur, if at all, only sporadically and unsystematically. As Carlos Casteneda put it, referring to Mexico, the dominant party was “no ‘tea party,’” but “[r]epression was truly a last resort.”³⁰¹ Steven Levitsky and Lucan Way describe competitive authoritarianism as combining both occasional “high-intensity coercion” and more routine “low-intensity coercion.”³⁰² The latter includes “surveillance [;] low-profile physical harassment[;] denial of employment, scholarships, or university entrance to opposition activists; denial of public services . . . to individuals and communities with ties to the opposition; and use of tax, regulatory, or other state agencies to investigate and prosecute opposition politicians, entrepreneurs, and media owners.”³⁰³ Authoritarian constitutional regimes lower the intensity of coercion even more, as with William Case's

²⁹⁹ For an overview of Singapore libel law, see *supra* Part I.C.1(c).

³⁰⁰ For a description of how Jeyaretnam conducted his life after bankruptcy, see Obituary, *Joshua B. Jeyaretnam*, TIMES ONLINE (Oct. 1, 2008), <http://www.timesonline.co.uk/tol/comment/obituaries/article4855720.ece>; see also ANDREW HARDING, THE CONSTITUTION OF MALAYSIA: A CONTEXTUAL ANALYSIS 99 (2013) (describing the detention of a Malaysian opposition leader who continued to be “an effective and indefatigable Leader of the Opposition”).

³⁰¹ BEATRIZ MAGALONI, VOTING FOR AUTOCRACY: HEGEMONIC PARTY SURVIVAL AND ITS DEMISE IN MEXICO 10–11 (2006). The reference is to the famous statement by Mao Tse-Tung, “Revolution is not a tea party,” not to the Tea Party movement in the United States.

³⁰² LEVITSKY & WAY, *supra* note 11, at 58.

³⁰³ *Id.*

example of denying upgrades in services, not the services themselves, to districts where the opposition is strong.³⁰⁴

(5) The dominant party is sensitive to public opinion and alters its policies at least on occasion in response to what it perceives to be public views.³⁰⁵ Its motivation for responsiveness may be mixed, though a desire to remain in power dominates other motivations such as judgments about what is in the nation's best interests.

(6) It may develop mechanisms to ensure that the amount of dissent does not exceed the level it regards as desirable. Beatriz Magaloni focuses on the hegemonic party's efforts to keep whatever dissent occurs within its ranks, by holding out the prospect of rewards not only to party loyalists but to party activists who challenge the party from within. "[C]o-optation is better than exclusion" because it allows the hegemonic party to achieve the massive victories it requires.³⁰⁶ I have already described some of Singapore's mechanisms for co-optation.³⁰⁷ There are of course less formal methods of co-optation. For example, Singapore is said to have an extremely effective system of early talent spotting, through which promising young people are noticed in the universities and channeled into government-supporting positions of power.³⁰⁸ These mechanisms of co-optation may have the collateral effect of increasing the regime's responsiveness to public opinion and criticism.

(7) Courts are reasonably independent and enforce basic rule-of-law requirements reasonably well. Although judges, especially those on higher courts, are likely to be sensitive to the regime's interests because of the judges' training and the mechanisms of judicial selection and promotion, they rarely take direct instruction from the regime. Sometimes, indeed, they might reject important regime initiatives on rule-of-law or constitutional grounds. But, the system of constitutional review will necessarily be weak-form review, with the regime having the power to alter the constitution so that its initiatives conform to the courts' interpretations.³⁰⁹

³⁰⁴ See *infra* text accompanying notes 357–58.

³⁰⁵ For a discussion of the limited deregulation of public places in Singapore, see *supra* text accompanying notes 72–75.

³⁰⁶ MAGALONI, *supra* note 301, at 16.

³⁰⁷ See *supra* notes 186, 196–99 and accompanying text.

³⁰⁸ For a summary of that system, see BARR & SKRBIŠ, *supra* note 6, at 70–71. That summary is elaborated more completely in the remainder of the cited work.

³⁰⁹ Building weak-form review into the constitution's structure may be affirmatively desirable because it openly describes the system's actual functioning. Writing strong-form review into the constitution, in contrast, raises the possibility that the regime's actions in response to judicial rulings will reek of hypocrisy. See Upham, *supra* note 60, at 1503.

B. The Role of Ideology

Authoritarian leaders often articulate a comprehensive ideology they use to justify the unrestrained exercise of power—revolutionary Marxism, Peronism, *chavismo*.³¹⁰ Constitutionalism is an ideology that justifies both the use of power and its justified restraints. Can authoritarianism be combined with constitutionalism into a distinctive regime ideology?

The so-called Asian values debate in the 1990s suggested one possibility, briefly pursued by Lee Kuan Yew. According to him, “In the East the main object is to have a well-ordered society so that everybody can have maximum enjoyment of his freedoms.”³¹¹ Individuals were not “pristine and separate,” but had to be seen in a wider context, first of their families, then “friends and the wider society.”³¹² Similarly, as summarized by Bruce Rutherford, some proponents of Islamic constitutionalism see in the state “a carefully maintained path that directs state power toward the transformation of individual Muslims and the creation of a more pious community.”³¹³ Constitutionalism “ensure[s] that the state stays on this path and fully achieves its potential to change individuals and society.”³¹⁴

The Asian values debate became exhausted when participants realized that, as articulated by its proponents, “Asian values” were not an alternative to constitutionalism but a version of it,³¹⁵ what one analyst called “republican communitarianism.”³¹⁶ It differed from “Western”

³¹⁰ For discussions of authoritarians’ ideologies, see, e.g., JUAN J. LINZ, *TOTALITARIAN AND AUTHORITARIAN REGIMES* 95 (2000) (discussing Marxist ideology in totalitarian regimes); GUILLERMO O’DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 21 (1990) (discussing Peronism in the context of “bureaucratic-authoritarian” rule in Argentina); Robert Mayer, *Strategies of Justification in Authoritarian Ideology*, 6 J. POL. IDEOLOGIES 147, 148 (2001) (enumerating different ways to justify authoritarianism).

³¹¹ Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kuan Yew*, 73 FOREIGN AFF. 109, 111 (1994). For the background of Lee Kuan Yew’s thought, see Michael D. Barr, *Lee Kuan Yew and the “Asian Values” Debate*, 24 ASIAN STUD. REV. 309, 309 (2000).

³¹² Zakaria, *supra* note 311, at 113.

³¹³ RUTHERFORD, *supra* note 291, at 126.

³¹⁴ *Id.*; see also Li-Ann Thio, *A Bill of Rights Without a ‘Rights Culture’? Fundamental Liberties and Constitutional Adjudication in Singapore*, in *COMPARATIVE CONSTITUTIONAL LAW* 303, 319 (Mahendra P. Singh ed., 2011) (summarizing the government’s preferred “national ideology” as encapsulated in the 1991 Shared Values White Paper, Cmd. 1 of 1991 (Jan. 2, 1991) (Sing.), which are “nation before community and society above self; . . . regard and community support for the individual; . . . consensus instead of contention; and . . . racial and religious harmony”).

³¹⁵ *But see* Rodan, *supra* note 119, at 242 (asserting that “the ideological utility of . . . Asian values diminished, not least because with the onset of the Asian financial crisis of 1997 the ‘Asian way’ became too closely associated with corruption and economic mismanagement”).

³¹⁶ Barr, *supra* note 311, at 312 (quoting Neera Badhwar, *Moral Agency, Commitment and Impartiality*, in *THE COMMUNITARIAN CHALLENGE TO LIBERALISM* 1, 4–5 (Ellen Franken Paul et al. eds., 1996)).

versions of constitutionalism only in the degree to which standard limitations on individual rights were used to justify government policies. So, for example, limitations clauses in the European Convention on Human Rights—an undeniably liberal constitutionalist document—authorize limitations on the right to private and family life and also on the right to freedom of expression:

In the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.³¹⁷

As formulated, if not as applied by the European Court on Human Rights, these phrases fit comfortably within Lee Kuan Yew's articulation of "Asian values." As Surain Subramaniam puts it, perhaps "Asian values are not much more than conservative western values"—values, I would stress, that are part of the general constitutionalist tradition.³¹⁸ Seen in this way, the Asian values debate is a debate within that tradition.

The ideology of authoritarian constitutionalism can be understood as lying near one end of a spectrum running from strong libertarianism through U.S.-style liberalism and the European tradition of social democracy to a constitutionalism that freely invokes standard justifications for restrictions on individual freedom. Importantly, though, authoritarian constitutionalism is constitutionalist because it invokes *standard* justifications, not ones flowing from a distinctive authoritarian ideology.

The Asian values debate ended with its proponents retreating from the position that there were distinctive Asian values ordering their versions of authoritarian constitutionalism, defending those versions instead on pragmatic grounds. Subramaniam offers a good summary of the pragmatic argument:

(a) Western liberal democracy is only one variant, among many, of democratic systems of government; (b) each country has its own unique set of natural, human, and cultural resources, as well as historical and political experiences; (c) the mode of governance or the political system of a country must not only accommodate those unique features but also devise responses that will resonate with the members of that society . . . ; (d) the legitimacy of any political system, including democracy, must be evaluated according to its ability

³¹⁷ European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8 ¶ 2, 10 ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 221.

³¹⁸ Surain Subramaniam, *The Asian Values Debate: Implications for the Spread of Liberal Democracy*, 27 ASIAN AFF. 19, 24 (2000).

to achieve certain ends . . . ; and (e) determining the type of political system that is to be adopted in a particular society involves finding the best social and political arrangements by means of a pragmatic and continuous process of experimentation.³¹⁹

So, for example, under the conditions facing Singapore, authoritarian constitutionalism might be “the best . . . political arrangement[]”³²⁰ for achieving rapid economic growth—or, as suggested earlier, for maintaining ethnic and religious peace.³²¹ Whether it is would of course depend on a careful analysis of the available institutional alternatives. Singapore’s multiethnic society might face threats to social order of a different degree than those faced by the United States or other more liberal constitutional regimes. In 1964, Singapore, then a member of the Federation of Malaysia, experienced two significant episodes of ethnic rioting between Chinese and Malay groups.³²² Those conflicts had an important effect on Lee Kuan Yew’s thinking about the appropriate institutional design for Singapore. Maintaining social order through restrictions on individual liberty was the pragmatic authoritarian constitutionalist response.

One hint that pragmatism undergirds Singapore’s regime is its use of sedition law. Historically, authorities have used sedition law to target regime critics.³²³ Singapore’s authorities use it differently: to target those whose speech threatens to revive ethnic conflict. Perhaps one could fairly describe the speech involved in these prosecutions as hate speech or some analog thereto. If so, perhaps we should treat Singapore as pushing against the limits of liberal constitutionalism from within. The United States Constitution has been interpreted to place substantial limits on hate speech proscriptions,³²⁴ but most other liberal democracies have reasonably broad bans on hate speech.³²⁵ Those bans might not be broad enough to cover the speech at issue in the Singapore cases, which is why I describe Singapore as pushing against the limits, but Singapore’s use of sedition to

³¹⁹ *Id.* at 22 (citations and internal quotation marks omitted); *see also* RUTHERFORD, *supra* note 291, at 128–30 (describing the ways in which the “vagueness” of Islamic constitutionalism allowed the Egyptian Muslim Brotherhood to present “a liberal conception of Islamic political order” in the 1980s and 1990s).

³²⁰ Subramaniam, *supra* note 318, at 22 (citations and internal quotation marks omitted).

³²¹ *See supra* Part I.E.

³²² *See supra* notes 127–31 and accompanying text

³²³ *See, e.g.*, Roger B. Manning, *The Origins of the Doctrine of Sedition*, 12 ALBION: Q. J. CONCERNED WITH BRIT. STUD. 99, 100 (1980) (providing a history of sedition laws in Tudor England).

³²⁴ *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (detailing the scope of constitutionally permissible regulations on hate speech).

³²⁵ *See, e.g.*, Robert A. Kahn, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Lowenstein and Robert Post*, 41 HOFSTRA L. REV. 545, 547 (2013) (noting that the United States has uniquely narrow restrictions on hate speech).

target “quasi” hate speech does not seem to me categorically different from the use of hate speech law in most Western democracies.

None of this is to deny, of course, that the pragmatic defense of authoritarian constitutionalism is ultimately empirical, and that those offering it typically have an interest in exaggerating the extent to which their policies secure social peace and economic growth, as compared to available alternatives. Yet, even so qualified, the pragmatic defense might give authoritarian constitutionalist regimes a degree of normative authority: they achieve socially desirable outcomes without engaging in the severe intrusions on individual rights characteristic of fully authoritarian regimes.

C. The Possible Instability of Authoritarian Constitutional Regimes

With the characteristics enumerated earlier,³²⁶ I believe, authoritarian constitutionalism is at least as normatively constitutionalist as the absolute monarchy I described. And, though what I have described is something like an ideal type, Singapore provides some indication that authoritarian constitutionalism is also empirically possible. The pragmatic defense of authoritarian constitutionalism introduces a degree of flexibility and adaptability into such regimes. Yet, the primary question about authoritarian constitutionalism is whether it describes a regime that can be reasonably stable over a reasonably long period.³²⁷ Other than Singapore, there are few examples of actual systems that appear to fit the description of authoritarian constitutionalism, and some candidates that might have done so at some points have not persisted long.³²⁸ The PAP’s leadership provides a good ex-

³²⁶ See *supra* text accompanying notes 157–83.

³²⁷ The qualifications are necessary because one cannot demand “permanent” stability of any regime, and because I am willing to concede that fully democratic constitutionalist regimes may persist for longer periods than other constitutionalist ones, but I am not willing to concede that such regimes provide the definition of stability we should use. See Thomas Christiano, *An Instrumental Argument for a Human Right to Democracy*, 39 PHIL. & PUB. AFF. 142, 157 (2011) (arguing that a “consultation hierarchy,” a regime similar to the monarchy I have described, “is not impossible; it is just very unlikely” because its stability depends on sustained choices by the monarch and his or her successors, which cannot be assured).

I put aside as relevant to a different sort of analysis than the one I pursue here the question of the social and economic preconditions to authoritarian constitutionalism, but the point is almost inevitably made in discussions of Singapore that the nation’s economic success under the PAP regime has an important role in sustaining the regime. See Hwee, *supra* note 105, at 229.

³²⁸ For example, the Islamic Republic of Iran prior to the 2009 elections might have qualified as an authoritarian constitutionalist regime, but that year’s fraudulent presidential election either transformed it into a fully authoritarian regime or confirmed that it was already such a regime. See Bernd Beber and Alexandra Scacco, *The Devil Is in the Digits: Evidence that Iran’s Election Was Rigged*, WASH. POST (June 20, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/20/AR2009062000004.html>.

ample of what William Case describes as the importance of skill in designing institutions that sustain authoritarian constitutionalism.³²⁹ The co-optation mechanisms there are quite cleverly designed.³³⁰

Instability can be resolved in two directions. An authoritarian constitutionalist regime could lose its authoritarian character and become fully constitutionalist,³³¹ or it could lose its constitutionalism and become purely authoritarian.³³²

(a) In addition to the dynamic process described earlier in Part III.E.2, the first path might involve something like learning: toleration of some dissent increases, so that more dissent emerges, and the mechanisms of co-optation expand to encompass more people but weaken the commitment the co-opted have to the regime's authoritarianism. At some point members of the regime itself see little personal threat in abandoning the regime's authoritarian characteristics at least in part because the emerging leaders of the nascent fully constitutionalist regime understand that providing such assurances is essential to the transition after which they hope to be the new regime's leaders.³³³

(b) The transformation to authoritarianism (or mere rule-of-law constitutionalism) might itself have several variants. For example, (i) the regime's leaders might be unable to transmit a normative commitment to consultation and responsiveness to their successors.³³⁴ The successors become increasingly less responsive and deal with increasing dissatisfaction through repression and violence. Or, (ii) the regime's leaders face increasing public dissatisfaction but cannot obtain

³²⁹ See William Case, *Manipulative Skills: How Do Rulers Control the Electoral Arena?*, in ELECTORAL AUTHORITARIANISM, *supra* note 11, at 97.

³³⁰ Singapore's system for compensating high civil servants is another example of design skill (coupled with the nation's economic success). High civil servants receive "salaries pegged to economic performance and the salaries of the top echelons of a group of key professional classes." SREE KUMAR & SHARON SIDDIQUE, THE SINGAPORE SUCCESS STORY: PUBLIC-PRIVATE ALLIANCE FOR INVESTMENT ATTRACTION, INNOVATION AND EXPORT DEVELOPMENT 15 (2010).

³³¹ For a discussion of this possibility, see He & Warren, *supra* note 12, at 270 (discussing the possibility of such a transition in China). LEVITSKY & WAY, *supra* note 11, at 59, argue that competitive authoritarian nations with strong links to the West—a description that fits Singapore—are more likely than other such regimes to democratize.

³³² Cf. LEVITSKY & WAY, *supra* note 11, at 25–26 (describing the possibility that competitive authoritarianism will become stable authoritarianism).

³³³ I include the regime members' inheritable wealth within the items they might be concerned about. So, they do not anticipate confiscation of that wealth either directly or when passed on to their heirs.

³³⁴ One question about the Singaporean example is the extent to which it is parasitic on the special intellectual and charismatic characteristics of Lee Kuan Yew, the nation's leader since independence (a leadership that was formal for many years and now is informal, with Lee Kuan Yew serving until 2011 in the nonstatutory post of Minister Mentor). Notably, the current prime minister is Lee Kuan Yew's son. Put in more general terms, Lee Kuan Yew's overwhelming role has meant that the PAP has not had to face severe problems of leadership succession and the possibility of intra-elite competition for leadership.

assurances that they would not suffer severe losses were they to leave office. To avoid those losses, they repress dissent.³³⁵

The literature on what political scientists call electoral or competitive authoritarian regimes suggests one important constraint on the unraveling of constitutions in authoritarian regimes and provides a way to conclude the discussion of the possibility of a relatively stable authoritarian constitutionalism. Andreas Schedler defines electoral authoritarianism: “[E]lections are broadly inclusive . . . [,] as well as minimally pluralistic . . . , minimally competitive . . . , and minimally open.”³³⁶ For Beatriz Magaloni, “hegemonic-party systems allow opposition parties to challenge the incumbent party through multiparty elections.”³³⁷ Electoral authoritarian or hegemonic-party regimes are assured of victory in these elections.³³⁸ And, Magaloni emphasizes, not just victory—the dominant party in a dominant-party regime is assured of victory—but landslide yet minimally manipulated victories: “[H]egemonic-party systems are far more overpowering than predominant-party systems, usually controlling more than 65 percent of the legislative seats—so that they can *change the constitution unilaterally*, without the need to forge coalitions with opposition parties. This implies that there is no binding set of constitutional rules”³³⁹

The risk of unraveling occurs precisely because there is no such set. And yet, the existence of more-or-less real elections indicates that these regimes are not fully authoritarian. Again, political scientists can offer instrumental accounts for conducting elections, but such accounts have the same vulnerabilities as instrumental accounts of other neutral institutions.³⁴⁰ So, for example, Magaloni identifies these functions: elections are designed “to establish a regularized method to share power among ruling party politicians”; “to disseminate public information about the regime’s strength that would serve to discourage potential divisions within the ruling party”; “to provide information about supporters and opponents of the regime”; and “to trap the opposition, so that it invests in the existing autocratic institutions rather than challenging them by violent means.”³⁴¹ As I have argued, these functions could be served by other institutional mechanisms, as for example occurs in the authoritarian People’s Republic of China.

³³⁵ Again, I put to one side other origins of a transformation into authoritarianism such as defeat in a foreign adventure or severe economic stress, whether caused by regime missteps or exogenously.

³³⁶ Andreas Schedler, *Electoral Authoritarianism*, in THE SAGE HANDBOOK OF COMPARATIVE POLITICS 381, 382 (Todd Landman & Neil Robinson eds., 2009).

³³⁷ MAGALONI, *supra* note 301, at 32.

³³⁸ *See id.* at 32–33.

³³⁹ *Id.* at 35; *see also id.* at 259–61 (describing how hegemonic-party control in Mexico produced “the [e]ndogeneity of the Constitution”).

³⁴⁰ *See supra* text accompanying notes 172–73.

³⁴¹ MAGALONI, *supra* note 301, at 8–9.

With autocratic control, more-or-less real elections will occur when, but only when, they produce the kinds of massive victories that give the regime control over the processes for modifying the constitution.³⁴²

The main contribution of the scholarly literature on competitive or electoral authoritarianism to an inquiry into authoritarian constitutionalism is its focus on elections that are open, competitive, and pluralistic, though minimally so, according to Schedler.³⁴³ They must be only minimally so lest the authoritarian regime become simply a liberal democracy with a dominant party. All the accounts make electoral manipulation a feature of these regimes. Yet, as Schedler and Magaloni note, while it is easy to distinguish “mere” manipulation from gross fraud and intimidation, it is much more difficult to distinguish it from the ordinary practices of politicians in liberal democracies.³⁴⁴ Schedler enumerates “the enactment of discriminatory election laws, the repression of protest marches, [and] the exclusion of candidates from the ballot by administrative fiat,” as mechanisms to ensure massive victories.³⁴⁵ But, he continues, because “people may differ in their concrete definitions of democratic minimum standards . . . [,] the frontier between electoral democracy and electoral authoritarianism represents essentially contested terrain.”³⁴⁶ Similarly, Magaloni observes that “the ruling party can commit electoral fraud or threaten to repress its opponents,” but she criticizes Schedler for treating as “manipulations” behavior that “can also take place in systems that we normally regard as democratic,” such as ““self-serving rules of representation granting [incumbents] a decisive edge when votes are translated into seats.”³⁴⁷

Return now to Singapore for some examples. (1) *Manipulation affecting opposition candidates*. As noted earlier, Singapore’s constitutional bars from the Parliament anyone who “is an undischarged bankrupt.”³⁴⁸ The PAP intimidates the opposition not by arresting opponents for political offenses or on fake charges but by suing them for libel. Using what Levitsky and Way describe in a different context

³⁴² See, e.g., *supra* text accompanying notes 106–23 (discussing Singapore’s electoral history since 1981).

³⁴³ See Schedler, *supra* note 15, at 2–7 (describing the concept of electoral authoritarianism).

³⁴⁴ See *id.* at 3. A good account of electoral manipulations in the United States is Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

³⁴⁵ MAGALONI, *supra* note 301, at 19, 33–34; Schedler, *supra* note 336, at 385.

³⁴⁶ Schedler, *supra* note 336, at 385.

³⁴⁷ MAGALONI, *supra* note 301, at 19, 33–34 (quoting Schedler, *Elections Without Democracy: The Menu of Manipulation*, 13 J. DEMOCRACY 36, 45 (2002)).

³⁴⁸ CONST. OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, art. 45(1)(b); see *supra* note 45.

as “colonial-era” libel laws,³⁴⁹ the PAP’s leaders obtained substantial judgments based on publications fairly treated under the libel laws as libelous statements about the crass motivations of politicians promoting the PAP’s policies. Notably, J.B. Jeyaretnam, a prominent opposition leader, twice lost his seat in Parliament, once after being convicted of a financial offense in connection with his party’s funds and once for failing to pay damages to PAP leaders for libeling them.³⁵⁰ The libel laws Singapore’s leaders use to intimidate the opposition are indeed old fashioned and almost certainly not in tune with standards that prevail even outside the United States with its especially severe restrictions on libel law as applied to public figures. Yet certainly taken on their own, and probably even in connection with Singapore’s wider system of regulating expression, Singapore’s libel laws seem within the bounds of liberal constitutionalism—as might be suggested by the fact that other common law nations used quite similar rules until relatively recently and were at those times rather clearly liberal constitutional states anyway.³⁵¹

(2) “*Gerrymandering*.” Manipulation of constituency boundaries—classical gerrymandering—is of course possible in liberal democracies as well as in other regimes.³⁵² A related example of electoral manipulation well short of fraud is Singapore’s GRCs.³⁵³ Whatever their possible good-government rationales, the GRCs serve to impede opposition electoral success.³⁵⁴ A charismatic or otherwise extremely popular opposition candidate might win in a single-member district but might find it more difficult to carry the whole list to victory in a GRC: one charismatic candidate and two dull ones might lose to a PAP slate of three solid but unexciting candidates.³⁵⁵ The GRCs appear to explain the dramatic translation of substantial but not over-

³⁴⁹ Levitsky & Way, *supra* note 173, at 58 (referring to the use of similar laws by Jerry Rawlings in Ghana); see also LEVITSKY & WAY, *supra* note 11, at 8–9 (describing the “widespread . . . use of libel or defamation laws against journalists, editors, and media outlets”).

³⁵⁰ See Mydans, *supra* note 48. The book LEE’S LAW, LYDGATE, *supra* note 36, is an admiring biography of Jeyaretnam.

³⁵¹ For another example, see Anil Kalhan, “Gray Zone” *Constitutionalism and the Dilemma of Judicial Independence in Pakistan*, 46 VAND. J. TRANSNAT’L L. 1, 23 (2013) (describing the creation of a requirement that members of Parliament hold college degrees).

³⁵² See HARDING, *supra* note 300, at 91 (describing classical gerrymandering in Malaysia).

³⁵³ See Thio, *supra* note 31, at 47 (referring to the GRC system as “gerrymandering”).

³⁵⁴ See *id.* at 41.

³⁵⁵ The GRCs also help the PAP in recruiting candidates who might be reluctant to put themselves forward without assurances of success. Those assurances can be provided by putting the candidate on a slate headed by a popular minister. See Li-Ann Thio, *In Search of the Singapore Constitution: Retrospect and Prospect*, in EVOLUTION OF A REVOLUTION, *supra* note 111, at 328–29.

whelming victories in the popular vote into overwhelming predominance in the legislature.³⁵⁶

(3) *“Pork barrel” spending.* Finally, William Case argues that the leaders of the Malaysian electorally authoritarian regime engage in vote-buying by providing supporters with valuable benefits such as “on-the-spot ‘development grants’ for new clinics, paved roads, or mosques.”³⁵⁷ Similarly, “Singapore’s government has threatened to cut off state funding for public housing upgrades in those districts where opposition candidates win.”³⁵⁸ Magaloni puts the point more generally: “[T]he ruling party monopolizes the state’s resources and employs them to reward voter loyalty and to punish voter defection.”³⁵⁹ From another perspective, though, these are examples of ordinary pork-barrel politics or credit-claiming by elected politicians in liberal democracies.³⁶⁰

These examples illustrate the difficulty of distinguishing electoral manipulations in hybrid regimes from ordinary politics in liberal con-

³⁵⁶ See also HARDING, *supra* note 300, at 86 (noting the electoral distortion in Malaysia, where a majority of 50.27% translated into 140 legislative seats, while a slight minority of 46.75% translated into only 82 seats). The limited period in which formal campaigning for office is allowed—nine days—should also be mentioned here, as a design feature that limits the opposition’s opportunity for publicizing its position. See SEOW, *supra* note 64, at 36. In the United States, the franking privilege available to sitting members of Congress provides them with a similar structural advantage in disseminating their positions, at least in connection with constituent services.

³⁵⁷ Case, *supra* note 329, at 103; see also HARDING, *supra* note 300, at 143–44 (describing the national government’s cancellation of oil and gas royalties scheduled to be paid to a state governed by the opposition party).

³⁵⁸ Case, *supra* note 329, at 104; see also Thio, *supra* note 31, at 30–31 (describing a speech made by Prime Minister Goh in 2001 stating that precincts that cast more than 50% of the vote for the PAP “would enjoy priority in upgrading programmes”). Note that Case and Goh (quoted by Thio) refer to denying upgrades, not withdrawal of existing subsidies. See HARDING, *supra* note 300, at 92 (noting “threats of economic sanctions for areas returning opposition candidates”).

³⁵⁹ MAGALONI, *supra* note 301, at 19. See also MICHAEL DODSON, LET MY PEOPLE LIVE: FAITH AND STRUGGLE IN CENTRAL AMERICA 123, 126 (1988) (describing forms of withdrawing public resources from opposition-led areas in Venezuela).

³⁶⁰ With respect to Singapore, after the U.S. Department of State expressed concern over Lee’s statement that “constituencies that elect opposition candidates will receive low priority in extensive government plans to upgrade public housing facilities,” a major figure in the PAP “professed surprise that the Americans should ‘raise an issue about how we run democratic politics in Singapore when their pork-barrel politics is something of a long tradition.’” FRANCIS T. SEOW, BEYOND SUSPICION? THE SINGAPORE JUDICIARY 39–40 (2006); cf. Fernanda Brollo & Tommaso Nannicini, *Tying Your Enemy’s Hands in Close Races: The Politics of Federal Transfers in Brazil*, 106 AM. POL. SCI. REV. 742, 743 (2012) (finding that the national government “punishes” municipalities led by mayors from opposition parties by giving them smaller discretionary transfers than those given to municipalities led by mayors from the governing coalition). The standard citation for credit claiming is DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); see also James A. Robinson & Ragnar Torvik, *White Elephants*, 89 J. PUB. ECON. 197, 201 (2004) (providing a formal model of inefficient pork-barrel spending as a technique used to provide credible commitments to constituents, thereby giving them a reason to vote for the incumbent party).

stitutional ones.³⁶¹ After several pages seeking to distinguish competitive authoritarianism from pure authoritarianism and democracy, Levitsky and Way find themselves offering a summary of the “[l]evel of [u]ncertainty” associated with competitive authoritarian elections: the level is “[l]ower than democracy but higher than full authoritarianism.”³⁶² At some point, of course, matters of degree become matters of kind, and the cumulative and perhaps interactive effects of several types of manipulation might exceed even a rather extensive exercise of an individual type in a liberal democratic regime. But perhaps we should consider some hybrid regimes as falling within the domain of normative constitutionalism.

CONCLUSION

Singapore is not a bad place to live even for dissidents from the regime. They might suffer relatively low levels of government harassment, be deprived of access to some significant government benefits, and the like, but few are hounded into exile, and even fewer are thrown arbitrarily in jail.³⁶³ Yet, of course, it is not a liberal democracy. From a normative point of view the central question, probably unanswerable now, is whether a Singapore without authoritarian constitutionalism would be a liberal democracy or a fully authoritarian state. If the latter, authoritarian constitutionalism may be normatively attractive *for Singapore*.

There may well be additional forms of normatively constitutionalist systems that are not fully constitutionalist.³⁶⁴ I hope that these observations will contribute to a more sustained consideration both of additional conceptual possibilities and, in my view more important, of cases in which we can observe something other than authoritarianism

³⁶¹ I note my sense that some of the work on hybrid regimes trades on failing to distinguish sharply enough between electoral fraud and electoral manipulation, evoking images of fraud to motivate analyses that describe systems that are of particular interest because only manipulation occurs. For examples, see MAGALONI, *supra* note 301, at 18 (“A third instrument hegemonic parties employ to deter party splits is raising the costs of entry to potential challengers by . . . threatening to commit electoral fraud against them and to use the army to enforce such fraud.”); Levitsky & Way, *supra* note 173, at 52–53 (“Incumbents violate . . . rules so often and to such an extent . . . that the regime fails to meet conventional minimum standards for democracy. . . . Members of the opposition may be jailed, exiled, or—less frequently—even assaulted or murdered.”). In contrast, see MAGALONI, *supra* note 301, at 21 fig.I.1 (identifying a category in which there is “[n]o need for electoral fraud”).

³⁶² LEVITSKY & WAY, *supra* note 11, at 13 tbl.I.1.

³⁶³ See *supra* Part I.

³⁶⁴ To adapt a well-known line concluding another, far more important paper, it has not escaped my notice that the argument developed here might support the proposition that the United States does not have a fully constitutionalist system. Cf. CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 356 (1977) (“The large private corporation fits oddly into democratic theory and vision. Indeed, it does not fit.”).

and full normative constitutionalism. I believe that there are such cases, and that examining them would shed light not only on questions of institutional design within a normatively constitutionalist framework but also on normative constitutionalism itself.³⁶⁵

³⁶⁵ One promising candidate for examination in the service of pluralizing the idea of constitutionalism are the post-Communist nations of central and eastern Europe. They are often described as “transitional,” yet, as the political science literature suggests, *see supra* Part III.E.1, that term might be inapt in light of the persistence of the “transition.” Seeing these nations as exemplifying a distinctive form of constitutionalism, we might be able to develop some analytic purchase on their characteristics. For example, Wojciech Sadurski’s study suggests that constitutional courts in the post-Communist nations have done a better job in adjudicating individual rights claims than in dealing with issues of separation of powers. *See* WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* 58–62 (2005). Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC’Y REV. 117, 131–32 (2001), offer an analytic framework that might begin to account for this pattern.

